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No. 973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

EDWARD R. GAYLES,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No.

EDWARD R. GAYLES,

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vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

The petitioner, Edward R. Gayles, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division was entered on May 22, 1962, and is not reported, but appears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith.

The Opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, is reported in 327 Fed. (2d) 715 and is set forth in the appendix hereto.

JURISDICTIONAL STATEMENT.

The Opinion of the United States Court of Appeals was filed February 12, 1964 and the Petition for Rehearing was denied March 9, 1964. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254 (1), 62 Stat. 928.

QUESTIONS PRESENTED.

I.

Should not this Court, for the first time, decide the legal propriety of an instruction that a jury may consider a witness' use of narcotic drugs in determining such witness' credibility, in furtherance of this Court's holding in *Robinson* v. *California,* 370 U.S. 660, 8 L. Ed. (2) 758?

II.

Where, petitioner, an attorney, is charged with a conspiracy to traffic in narcotics and the only persons who testified against him were users of narcotic drugs, whose testimony was emphatically denied by petitioner, did not the trial court err and deny petitioner "Due Process of Law" when it refused to instruct the jury, as proffered by petitioner, that the jury may consider the use of narcotic drugs in determining the credibility of a witness?

III.

Can acts by alleged co-conspirators to avoid and defeat prosecution and punishment for the commission of the conspiracy, or to avoid and defeat prosecution and punishment for the commission of acts unconnected with the conspiracy, be construed as acts committed in furtherance of the conspiracy?

IV.

Did the trial court's effort to "Balance" Petitioner's instruction on the rights and duties of an attorney to his client, which the trial court erroneously felt was "misleading" and "directed a verdict of not guilty," with the trial court's instruction that "an attorney has no special status or license to commit a crime," direct the jury to find petitioner guilty?

STATUTES INVOLVED.

Section 174, Title 21 United States Code, set forth in the appendix.

STATEMENT OF CASE.

Petitioner, Edward R. Gayles, Arthur Faulkner, Jr., Willard Jones, Gladys Davis, Percy Johnson, Floyd Williams, Dennis Green and Nathaniel Spurlark, were charged as defendants in a one count indictment with having, from on or about January 1, 1952 to and including the date of the return of the indictment, September 2, 1959, conspired with each other and with other named co-conspirators, not defendants, to knowingly import into the United States narcotic drugs contrary to law, and to buy and sell such narcotic drugs, knowing the same to have been imported into the United States contrary to law, in violation of Title 21, United States Code, Section 174.

After the trial of the said defendants and petitioner had commenced, but before the Government rested its case, the defendants, Percy Johnson and Floyd Williams, were severed from the trial. Each of the remaining defendants[1] and petitioner were found guilty by the jury. Petitioner was sentenced to imprisonment for five years.

[1] Each of the defendants have filed their respective petitions for Writ of Certiorari.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

At the time of the trial; February 20 to March 8th, 1962, petitioner was an attorney at law and has been engaged in the private practice since December, 1952, (A. 317). After receiving his law degree in 1950, in December of that year, he became an enforcement agent of the Bureau of Narcotics of the United States Treasury Department, assigned to the Chicago office, in which service he remained until his resignation in December, 1952, (A. 316).[1] It was upon his resignation from the Treasury Department that he entered the private practice of law, (A. 317).

Of the twenty-two Government witnesses, only five mentioned petitioner in their testimony. Moses Winston Mardis, one of the five, was a professional bondsman, (A. 217). As to petitioner, he merely testified that at petitioner's request he obtained the release of the co-defendants, Percy Johnson and Floyd Williams, on bond and brought them to petitioner's office, (A. 224). Each of the other four Government witnesses, who mentioned petitioner in their testimony, used narcotic drugs. None of these four attributed the commission of any conspiratorial act to petitioner. Petitioner had represented each of these four Government witnesses in various cases in which they were charged with sundry violations.

Noble R. Thigpen, the first Government witness, an alleged co-conspirator, but not a defendant, was the first of these four witnesses to mention petitioner. At the time Thigpen testified there were two indictments, charging him with the unlawful sale of narcotic drugs to Federal

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[1] (A. 316), refers to the printed Appendix, (The Record on Appeal), filed in the Court of Appeals.

Narcotic agent Bailey, pending against him in the Criminal Court of Cook County, Illinois, (A. 64-65). He was aided in these sales of narcotics to agent Bailey by his 15 year old son, (A. 86). He did not expect to be prosecuted for these violations, which he admittedly committed, because of his testimony in the case at bar, (A. 64, 67). Thigpen used narcotics from 1949 up until December, 1961, (A. 53, 71). In March, 1958, he went to Lexington, Kentucky for narcotic addiction treatment, (A. 61), and stayed there only twelve days. Although not cured of his addiction, he signed himself out of the hospital, (A. 66), and returned to Chicago, (A. 61). He also returned to the use of narcotics, and used drugs once or twice a week until November, 1961, when he again went to Lexington for narcotic addiction treatment. On this occasion he remained there for two weeks and again signed himself out of the institution, though not cured of his addiction, (A. 63, 75). He testified that he last used narcotics about three months before he testified on the trial. At Thigpen's request petitioner represented him in a narcotics case in April, 1953, for which he paid petitioner $150, (A. 61).[1]

Willard S. Evans, an alleged co-conspirator but not a defendant, commenced using narcotics in 1950 and used heroin twice daily, if he had the money, from that time until August of 1961 (A. 246). He too had an indictment pending against him in the Criminal Court of Cook County for the unlawful possession of narcotic drugs, in which case he had not acquired or retained an attorney to represent him, (A. 248). In August 1959, when he testified

[1] The Court sustained objections to and the jury was instructed to disregard Thigpen's testimony that petitioner told him for a sum he would see to it that the police would not bother him again. This testimony could not be properly considered by the jury and petitioner, therefore, presented no rebuttal evidence thereto.

before the Grand Jury that returned the instant indictment on September 2, 1959, he had used heroin and had used it on two occasions on the previous day, (A. 271). Subsequent to his grand jury appearance, he burglarized a grocery store, for which the charge of burglary was pending against him when he testified on the trial of the cause on March 6, 1962, (A. 268). Evans had never received any hospital treatment for a cure for his narcotic addiction, (A. 247). He had been confined in the County Jail for thirty-five days as punishment for the commission of an offense which does not appear of record, and he had taken a shot about three or four times since he had been out of jail, (A. 269). He also smoked marijuana and had done so a couple of weeks prior to his appearance as a witness in the trial, (A. 269). At 7:30 on the morning he testified, he had taken a cough medicine called Tussar, which contained codeine, (A. 269, 275). This cough medicine required the purchaser to sign his name with the druggist, but Evans did not do so when he made his last purchase of it, (A. 279).

Evans testified that prior to February, 1956, petitioner had represented him, (A. 248). His testimony that petitioner called him in February, 1956 and told him to leave from around the Set-Up Lounge because the police were looking for him, (A. 248), was denied by petitioner, (A. 323-325). It was uncontroverted, however, that Evans requested petitioner to ascertain why the police were looking for him and that petitioner performed this service for him and told him that a warrant had been issued for his arrest for assault with intent to kill, (A. 234). Evans admitted that he had assaulted a state witness and that he didn't want to get arrested or go to court. He declined petitioner's advice to surrender to the authorities, telling petitioner that he was going to Winnetka.

Evans further testified that in August, 1957, he was arrested in his home, at which time some other people were arrested at another address. He was charged with loitering in violation of a Chicago Ordinance. Having been arrested in his home, he knew he was not guilty of loitering, (A. 250). The maximum penalty for a violation of the ordinance was a $200.00 fine, (A. 365). Evans retained petitioner to represent him in this case and paid him a fee of $200.00, (A. 250). He testified that petitioner later requested $500.00 more to "fix the case." Not having the $500.00, Evans testified he called defendant Green to obtain for it; that petitioner talked on the telephone, after which he and petitioner entered the courtroom and he was discharged on the case, (A. 251). He did not give petitioner the requested $500.00.

Petitioner denied that he made this request of Evans and was corroborated in his denial by Attorney Maurice Scott, who, from a review of his diary, testified that it was he who represented Evans in this case and that petitioner represented another defendant, who had been arrested at the time of Evans' arrest, (A. 365-368).

Government witnesses, Woodrow Wilson, another alleged co-conspirator who was not indicted as a defendant, and his wife, Elaine Wilson, both testified that they used marijuana, (A. 104, 131). Wilson was indicted in the Federal Court in St. Louis, Mo. for a narcotic violation. Petitioner represented him in the case, having been hired so to do by Mrs. Wilson. He pleaded guilty and was sentenced to five years in prison, (A. 149).

Wilson did not testify that petitioner was present during a conversation in the latter's home in which Wilson, Spurlark, Police Lt. George Sims and Police Sgt. James Bryson, arranged for Wilson to purchase narcotics from

Big John. For all that appears in this entire record, there is absolutely no evidence that petitioner even had knowledge that such a conversation ever occurred, (A. 92; Tr. 438-439).[1] Petitioner and Lt. Sims denied this conversation, (A. 319-320).

Wilson testified that he had been dealing in and selling narcotics since 1952, (A. 89). When he was arrested in his home in December, 1954, no narcotics were found; nor was he charged with a narcotics violation, (A. 115). He hired petitioner to represent him in the case and the case was dismissed, after which he went by petitioner's office in the Drexel Bank Building on the southeast corner of Oakwood Blvd. and Cottage Grove Avenue, (A. 114), and asked petitioner what was going to happen to his case, (A. 96). From his experience he knew the precautionary measures to take in dealing in narcotics, (A. 114). But petitioner, he testified, told him to be careful in handling packages, wear gloves and be careful of the telephone and tape recordings, (A. 96).

This too was denied by petitioner, (A. 320), who was corroborated in his denial by Attorney Stanley Cooke, (A. 368-369). Petitioner and Attorney Cooke testified that in December 1954, they and other attorneys were junior associates of Attorney Joseph E. Clayton, and that their office was not located in the Drexel Bank Building, Oakwood and Cottage Grove, but rather was at 3518 South State Street. The Sullivan Law Directory, as well as the Illinois Telephone Directory, further corroborated petitioner and Attorney Cooke and indisputably contradicted Wilson, (A. 370-371).

It was on cross examination of petitioner that the Government brought out that petitioner, petitioner's law part-

[1] (Tr. 438-439) refers to the trial transcript.

ner Eddie Johnson, Percy Sims Jr. a mortician, and the co-defendant Dennis Green were managers of The Mortician's Underwriters Association, in which petitioner, petitioner's father, the co-defendants Nathaniel Spurlark and Arthur Faulkner and Otis Sears were investors, (A. 338). The Government presented no evidence to show or suggest that this business venture was anything other than a bona fide and legitimate one.

It was also on cross examination of petitioner and his witness Lt. George Sims, that the Government repeatedly brought out before the jury that petitioner, George Sims and James Bryson had gone on various and sundry vacation trips with ladies, who were not their wives, (A. 339-341, 362). The Government did not even suggest, by evidence or otherwise, that these clandestine ventures had any possible connection with the offense for which petitioner was on trial.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

THIS COURT HAS NEVER PASSED UPON THE LEGAL PROPRIETY OF AN INSTRUCTION THAT THE JURY MAY CONSIDER A WITNESS' USE OF NARCOTIC DRUGS IN DETERMINING SUCH WITNESS' CREDIBILITY.

From the foregoing facts it is quite obvious that the Government's evidence did no more than smear petitioner, an attorney at law and former narcotic agent. It fell far short of establishing petitioner's membership or participation in a conspiracy to traffic in narcotics. The trial court recognized the deficiency of the Government's proof to establish the guilt of petitioner beyond a reasonable doubt. In overruling petitioner's post-trial motion for judgment of acquittal the trial court stated:

> *"* * * I must confess, Mr. Pincham, that I struggled most extensively with the Gayles' case, and, frankly, my clerk and I both have had long discussion about the reasonableness of the jury's verdict particularly with respect to defendant Gayles."*

Whether the Government's evidence was or was not sufficient to sustain the jury's finding, it was highly contested and controverted by petitioner. Each and every act of transgression attributed to him was denied by him, except his violation of his marital vows, for which he certainly was not on trial. The other transgressions were attributed to him by chronic users of narcotic drugs. The jury, therefore, should have been fully and properly instructed on every phase of the case. It was not so instructed. The

court gave not a single solitary instruction that the jury may consider the use of narcotic drugs in determining the credibility of a witness. Because the jury was not so instructed, petitioner was insatiably prejudiced. Had it been so instructed the scale might very well have tilted in favor of petitioner.

The Court refused Gayle's tendered instruction which read, (A. 442):

> "You are instructed that in determining the credibility of a witness, you may consider his use of narcotic drugs or any impairment of testimonial powers arising from any source. The capacity of a witness to observe and receive accurate impressions, to retain them in his memory and to correctly relate them; also his power and inclination to be truthful are all subjects that go toward the credibility of a witness."

In tendering this instruction, petitioner relied on the authority of *Fletcher* v. *United States*, 158 Fed. (2) 321 and Wigmore on Evidence, 3rd. Ed., 1940, Section 934. It is utterly astounding, to say the least, that this Court has not heretofore been called upon to pass upon the legal priority of an instruction that a jury may consider a witness' use of narcotic drugs in determining his credibility. This Court's decision, however, in *Robinson* v. *California*, 370 U.S. 660, 8 L. Ed. 2nd 758, decided only three months after the conclusion of the instant trial, is more than adequate authority for the giving of such an instruction. In fact, it is respectfully suggested, *ROBINSON* compels the giving of such an instruction. It is true that *ROBINSON* dealt with the constitutionality, under the 8th and 14th Amendments to the Constitution of the United States, of a California statute which made it a criminal offense to be addicted to the use of narcotics. But This Court's astute and scholarly recognition of narcotic addiction as an ill-

ness in *ROBINSON*, well supported and documented by the experts and authorities cited therein, permits no other conclusion than that the use of narcotic drugs by a witness is a proper consideration for the jury in determining such witness' credibility. This Court's opinion in *ROBINSON* certainly cannot be improved upon by this writer and needs no further amplification in this petition.

In reliance upon *ROBINSON*, the Supreme Court of Illinois, in *People* v. *Davis*, 188 N.E. (2) 225, held the Illinois Statute, which did not make it a criminal offense to be addicted to the use of narcotics as did the California Statute, but, rather, which prohibited the "unlawful use of narcotic drugs or to be under the influence of or be addicted to the *unlawful* use of narcotic drugs," was violative of the Fourteenth Amendment to the Constitution of the United States.

The Illinois Supreme Court is in further accord with the views expressed by this Court, in *ROBINSON*, that narcotic addition is an illness. But that Court, unlike this Court, has on several occasions been called upon to express the view that the use of narcotic drugs is a proper consideration for the jury in determining a witnesses' credibility. *People* v. *Hamby*, 6 Ill. (2) 559, 129 N.E. (2) 746, page 748; *People* v. *Boyd*, 17 Ill. (2) 324, 161 N.E. (2) 311, page 314; *People* v. *Crump*, 5 Ill. (2) 251, 125 N.E. (2) 615, page 621; *People* v. *Bazemore*, 25 Ill. (2) 74, 182 N.E. (2) 649, pages 650-651. The Illinois Supreme Court is not alone in this view: *Leland* v. *State*, 86 Tex. Cr. R. 285, 217 S.W. 147; *State* v. *Loon*, 29 Idaho 248, 158 P. 233; *Anderson* v. *State*, 65 Tex. Cr. R. 365, 144 S.W. 281; *People* v. *Webster*, 139 N.Y. 73, 34 N.E. 730; *Chicago and Northwestern Railway Company* v. *McKenna*, 74 Fed. (2) 155.

State v. *Concannon*, 25 Wash. 327, 65 P. 534 and 3 Wigmore, Evidence, 3rd Edition, 1940, Section 934.

The Court of Appeals in the case at bar, adroitly avoided stating or holding that petitioner's proffered instruction, that the jury may consider a witness' use of narcotic drugs in determining such witness' credibility, was erroneous, did not correctly state the law, or that there was no evidentiary support in the record for the giving of the instruction. For that matter, the Court of Appeals did not state or hold that the trial court should or should not have given Gayles' proffered instruction. The Court of Appeals merely held that, 327 Fed. (2) 715, page 718, "* * * *In different words the substance of Gayles' instruction was covered.*" This is a gross misstatement. The jury was not in any way instructed on the use of narcotic drugs as effecting a witness' credibility.

What the Court of Appeals has held is that, inasmuch as the jury was instructed on every other phase of credibility; *i.e.*, the jury's function of weighing testimony, the circumstances of a witness' testimony, his relation to the Government, promises or hope of reward, etc., the jury need not, therefore, have been additionally instructed that it may also consider the use of narcotic drugs in determining credibility.

But even this holding was not entirely satisfactory to the Court of Appeals. For the Court thereafter proceeded to endeavor to distinguish the holding in *Fletcher* v. *United States*, 158 Fed. (2) 321, and *People* v. *Bazemore*, 25 Ill. (2) 74, 182 N.E. (2) 649, on the nebulous position that in these cases the witness, who was addicted to the drugs, was uncorroborated in his testimony. Therefore, so holds the Court of Appeals, these two authorities are not applicable to the case at bar. The Court of Appeals therefore

holds that the use of narcotic drugs is a proper consideration in determining the credibility of a witness where such witness has not been corroborated, but that the use of narcotic drugs is not a proper consideration in determining credibility where such witness has been corroborated. The total absence of logic in this holding compels its rejection.

After pointing out that the testimony of the narcotic addict witnesses in *FLETCHER* and *BAZEMORE* was uncorroborated, The Court of Appeals then refused to rely upon or apply the court's own pronounced distinction to petitioner. The testimony of the narcotic users in the case at bar, as to petitioner, was wholly without any corroboration. By the Court of Appeals on distinguishing standard, *BAZEMORE* and *FLETCHER* were applicable to petitioner.

The Court of Appeals further recognized the tenousness of Its holding, for The Court immediately endeavored to further justify Its rejection of *FLETCHER* and *BAZEMORE* on the ground that, 327 Fed. (2) 715, page 719: "*The inference here could be that Evans was not an addict,* * * *.*" The inference could also be that he was an addict. Presumably, the Court is referring to Evans' addiction at the time he testified. There was no question that immediately prior to his testimony he was an addict. Moreover, Noble Thigpen candidly admitted his addiction to narcotic drugs at the time he testified.

In whatever manner the opinion of the Court of Appeals in the case at bar is to be evaluated, except from the inference derived by the court's affirmance of the convictions, the Court did not decide the legal propriety of Gayles' proffered instruction. The trial court erred in refusing to give it.

This Court recognized in *ROBINSON*, 330 U.S. 660, 8 L.Ed. (2) 758, P. 767, 768, (concurring opinion of Mr. Justice Douglas), that *"the addict is a sick person"* and *"has a disease and * * * must be treated as a sick person."* A fortiorari, petitioner was entitled to have had the jury instructed that it may consider this illness in determining the witness' credibility.

II.

ACTS BY ALLEGED CO-CONSPIRATORS TO AVOID AND DEFEAT PROSECUTION AND PUNISHMENT FOR THE COMMISSION OF THE CONSPIRACY, OR TO AVOID AND DEFEAT PROSECUTION AND PUNISHMENT FOR THE COMMISSION OF ACTS UNCONNECTED WITH THE CONSPIRACY, CANNOT BE CONSTRUED AND ARE INADMISSIBLE AS ACTS COMMITTED IN FURTHERANCE OF THE CONSPIRACY.

Even if the Government's evidence be true that petitioner called Evans at the Set-Up Lounge and advised him to leave to avoid apprehension by the police, and even if the Government's evidence be true that petitioner requested $500.00 from Evans to fix a disorderly conduct case pending against him, such evidence was not admissible on this trial for a conspiracy to traffic in narcotic drugs. These acts, at best, can be construed as no more than an effort on the part of co-conspirators to avoid prosecution and defeat punishment for the commission of acts totally and wholly unconnected with the alleged conspiracy. This Court held in *Krulewitch* v. *United States*, 336 U.S. 440, pages 443, 456-457; *Lutwak* v. *United States*, 344 U.S. 604, 97 L.Ed. 593 and *Gruenwald* v. *United States*, 353 U.S. 391; 1 L.Ed. (2) 931, pages 940-942, 943, 944, that efforts by alleged co-conspirators to avoid and defeat prosecution for the commission of the conspiracy or acts committed pursuant thereto or in

furtherance thereof cannot be construed as an act committed in furtherance of the conspiracy. The acts for which petitioner and Evans were endeavoring to avoid and defeat prosecution, if Evans' testimony is to be believed, were not even acts committed in furtherance of or pursuant to the alleged conspiracy. Evans had assaulted a witness and had been arrested for loitering—acts wholly unconnected with and unrelated to the alleged conspiracy to traffic in narcotics.

The Government in the trial court endeavored to justify the admission of this evidence on the ground that these acts were committed by petitioner "To insure the continued ability of a co-conspirator (Evans) to remain active in the conspiracy", (A.A. 30). Such was the position taken by the Government in its Memorandum in opposition to petitioner's post trial motion for judgment of acquittal.

It is unquestioned that co-conspirators need not know all the persons engaged in a conspiracy in order to be a member thereof. But in order for a transaction between two alleged co-conspirators to possibly be construed as an act by one to further the others "Continued ability to remain active in the conspiracy," the evidence must also establish that the two alleged co-conspirators knew that the other was a member of the conspiracy. It must then be further shown and established by the evidence that the particular act was knowingly done by them with an informed community of design and intent between them. There was absolutely no evidence that petitioner knew or even should have known that Evans was a member of the alleged conspiracy. How then can it possibly be said that his advise to Evans to leave the

(A.A. 30) refers to Gayles additional typewritten Appendix filed in the Court of Appeals and submitted herewith.

Set-Up Lounge because police were looking for him or his request for the $500.00 to fix a case, was an effort by petitioner to insure Evans' continued ability to remain active in a conspiracy, of which conspiracy, petitioner had no knowledge and of which petitioner did not know Evans was a member.

III.

THE TRIAL COURT'S EFFORT TO "BALANCE" PETITIONERS' INSTRUCTION ON THE RIGHTS AND DUTIES OF AN ATTORNEY TO HIS CLIENT, WHICH THE TRIAL COURT ERRONEOUSLY FELT WAS "MISLEADING" AND "DIRECTED A VERDICT OF NOT GUILTY", WITH THE TRIAL COURT'S INSTRUCTION THAT AN ATTORNEY HAS NO SPECIAL STATUS OR LICENSE TO COMMIT A CRIME, WAS TO DIRECT THE JURY TO FIND PETITIONER GUILTY.

Petitioner denied and refuted every misdeed attributed to him. He did not endeavor to justify such alleged improper conduct on the ground that he was an attorney. For the trial court, therefore, to instruct the jury that an attorney has no special status which permits him to perform an unlawful act or to join an unlawful conspiracy or assist a client to commit an unlawful act was to instruct the jury to find petitioner guilty. *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, page 408, 410; *Montford* v. *United States*, 271 Fed. (2) 52; *Smith* v. *United States*, 230 Fed. (2) 935. The trial court expressly recognized this. (A. 493). It felt it necessary to so instruct the jury "*in order to balance*" the instruction on an attorney's rights and duties to a client. The trial court stated that petitioner's proffered instruction on the rights and duties of an attorney to his client "*sounded to me like I was telling the jury,*

almost, to direct a verdict in favor of Mr. Gayles", and that "*I have to say to the jury that [being an attorney] doesn't make him a special figure in the case; he doesn't have a license to commit a crime or participate.*" (A. 405). In so doing, the trial court instructed the jury to find petitioner guilty.

CONCLUSION.

We importune this Court to grant Its Writ of Certiorari.

Respectfully submitted.

R. Eugene Pincham and
Charles B. Evins,
Attorneys for Petitioner.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 13849-13853

SEPTEMBER TERM, 1963 JANUARY SESSION, 1964

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 13849 v.

DENNIS GREEN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 13850 v.

GLADYS DAVIS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 13851 v.

ARTHUR FAULKNER, JR.,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff Appellee,

No. 13852 v.

EDWARD R. GAYLES,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 13853 v.

NATHANIAL SPURLARK,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

February 12, 1964

Before HASTINGS, *Chief Judge*, KNOCH and KILEY, *Circuit Judges*.

KILEY, *Circuit Judge.* Appellants appeal from their conviction, by a jury, after a thirteen day trial on an indictment charging a conspiracy to violate the narcotics law.[1] The five appeals were consolidated in this court.

In deciding the issue whether there was evidence upon which the jury could infer guilt of defendants beyond a reasonable doubt, we must take the testimony and reasonable inferences most favorable to the government. *United States* v. *Glasser*, 315 U. S. 60, 80 (1942), *United States* v. *Miele*, ... F. 2d ..... (7th Cir. Nos. 14145-49, January 8, 1964).

Thigpen,[2] at defendant Spurlark's direction, purchased narcotics from Katy Lewis from 1951 through 1956. After her death in 1956 Spurlark directed Thigpen to purchase from defendant Willard Jones.[3] In 1958 Spurlark directed him to pick up narcotics from defendant Gladys Davis. In 1958 Thigpen twice sold narcotics received from Spurlark to Narcotics Agent Bailey. From 1952 to 1955 witness[4] Wilson purchased narcotics from Spurlark and Lewis. He also arranged for his wife to purchase from them. Later Wilson bought narcotics from defendant Green and Green told him "you know Ted [Spurlark] and I are in business together . . . my partner." Witness William Smith purchased narcotics from Spurlark in 1953 and 1954 and thereafter from Katy Lewis until her death. After her death, Smith, at Spurlark's direction, bought narcotics from Jones and then from Gladys Davis. From 1952 to 1954 Evans[5] bought narcotics from Green, and later from Spurlark and Katy Lewis. In 1955 Spurlark told witness Mardis that he was putting Green "in charge of all activity on the west side."

In 1955, in a conversation at which Evans, Green, Spurlark and Mardis were present, Evans was told Green was

[1] A conspiracy in violation of 21 U. S. C. § 174.

[2] An unindicted co-conspirator.

[3] Appellant in No. 13854, not consolidated with these causes.

[4] "Witness," as used in this opinion, designates those who are neither defendants nor unindicted co-conspirators and who testified at the trial.

[5] An unindicted co-conspirator.

to take over the sale of narcotics on the west side. Late in 1955, with Green's permission, Evans and defendant Faulkner "combined" their business for the sale of narcotics on the west side for a few months. In June of 1956 Faulkner and Spurlark brought narcotics back from New York to relieve a "shortage" in Chicago. Evans purchased narcotics from Green from 1955 to 1959 except for a two month period when, in Green's absence, he bought from Faulkner.

Witness Rouzer of Detroit made several purchases from Spurlark in 1955. In 1958, at Spurlark's direction, Rouzer twice went to Gladys Davis' apartment to await narcotics deliveries. And twice Spurlark sent Gladys Davis to Detroit to get money from Rouzer for Spurlark.

It is needless to detail more of the testimony which amply justified the jury in the inference that at the center of this narcotics web was Spurlark, holding it together, and operating from the Rodeo Lounge on Chicago's south side, through Dennis Green, Evans and Faulkner on the west side, and through the late Katy Lewis, Jones and Gladys Davis on the south side.

The testimony against defendant Gayles, an attorney, did not link in any way with the sale or distribution of the narcotics. There is testimony favorable to the prosecution, however, and the inferences the jury could reasonably draw, to show that he was more than an attorney for the defendants; and that he knowingly participated intentionally, *Direct Sales Co.* v. *United States*, 319 U. S. 703, 711 (1943), in aiding his co-defendants, and others, from late 1954 to 1959, in carrying out their illegal enterprise: "After 1953" he was a manager, along with defendant Green, in the Morticians Underwriters Association, in which Spurlark and Faulkner had made investments. Gayles was present at the meeting and conversations in his home attended by Spurlark, Wilson, and police officers who were planning the arrest of "Big John," a competitor of Spurlark's whom the latter said "some people" wanted to "bust." Gayles told Thigpen, an addict and peddler

whom he represented, that for $125 per month he could see that the police did not bother Thigpen again. Gayles told Wilson to be careful about telephones and tape recorders, and to use gloves when handling packages because the police "will be trying to get" him. Gayles told Evans and Faulkner to stay away "from around the Setup" tavern because police officers were looking for them. He told Evans that he would need "five hundred" to fix a case, after confirming that Green would vouch for the money.

There is no merit to the contention of defendants that more than one conspiracy was shown, to their prejudice, by the evidence, or that the evidence showed merely a number of unrelated episodes.[6] There is testimony to show that Spurlark, beginning in 1952, was the source from which the narcotics flowed to his south and west side minions; and that Gladys Davis, Evans and Faulkner operated to some extent on both the south and west sides of the distribution structure. The jury could infer from this evidence that each defendant knew, or should have known, of the conspiracy. *United States* v. *Poliafico*, 237 F. 2d 97 (6th Cir. 1956), *cert. denied*, 352 U. S. 1025 (1957). It was not necessary that each co-conspirator knew all others or that each witness mention all, or that each one be involved throughout the entire span of seven years. *United States* v. *Micele*; ..... F. 2d ..... (7th Cir. Nos. 14145-49, January 8, 1964). A fluctuation of the membership during the span of this record of continuous activity cannot be compared to the facts in *United States* v. *Russano*, 257 F. 2d 712 (2d Cir. 1958), where the evidence established two conspiracies, with a break between the two. The rule in *Kotteakos* v. *United States*, 328 U. S. 750 (1946), is not applicable here, because the evidence shows but one conspiracy with Spurlark at the center and several conspirators radiating from him. The trial court properly denied motions for severance on grounds of variance or misjoinder.

[6] For example, the sale by Spurlark to witness Minnett Maljohn, in 1958, who took the purchased goods to Davenport, Iowa, established that the "white powder" Spurlark was selling was heroin hydrochloride.

Since the cases of Johnson and Williams were severed during trial, there is no merit of Gayles' contention of prejudicial joinder. The court, in ruling against Gayles' proffer of testimony of his pre-conspiracy participation in arrests of co-defendants, weighed the probable prejudice to Spurlark and Green against the probable gain to Gayles from the testimony. We see no abuse of discretion in the ruling, and cannot see error in denying him a severance because he could not, otherwise, introduce the testimony.

Gayles proffered an instruction which told the jury that Gayles' representation of co-defendants for narcotics violations was insufficient to prove his participation or membership in the conspiracy. It then went on to state, in the abstract, rights and duties of attorneys[1] in defense of alleged violations of law. The trial court read this instruction as tending to direct a verdict of not guilty, and added the following cautionary paragraph:

> "You are not to infer from the foregoing however, that an attorney has any special status which permits him to perform an unlawful act, or to join an unlawful conspiracy, nor may he knowingly assist a client to commit an unlawful act or to further an unlawful conspiracy."

We cannot say the court misread the proffered instruction, nor that the modification directed a guilty verdict or otherwise prejudiced Gayles, nor that the paragraph was without an evidentiary basis.

Gayles tendered an instruction dealing generally with jury's consideration of the use of narcotics as an element

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[1] "It is the right and duty of a lawyer to undertake the defense of a person accused of a crime, regardless of his personal opinion of the guilt of the accused. Otherwise, innocent persons, victims only of suspicious circumstances may be denied proper defense.

"Having undertaken such defense the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the ends that no person may be deprived of life or liberty, except by due process of the law.

"Under the law an attorney may not reveal or disclose to law enforcement agencies or to anyone, any information revealed to him by his client. And the fact that an attorney does not inform or advise law enforcement agencies of any information revealed to him by a client is not in any way to be taken or construed against said attorney."

in determining credibility, Faulkner offered an instruction naming government witness Evans as a ten-year addict prior to August, 1961, and stating his testimony should be received with "extreme caution and suspicion" and be given serious consideration only when corroborated. The court refused to give these instructions.

The court gave thorough instructions regarding credibility and weight of testimony, beginning:

> "You have heard much discussion of the question of the credibility and weight you are to give to the testimony of the particular witnesses. Let me be as explicit as I can on that."

The instruction went on to inform the jury that they were "sole judges" of credibility; that the presumption that a witness speaks the truth is rebuttable by the manner in which he testifies, the character of his testimony, or contradictory evidence; that in weighing the testimony of each witness they were to give *careful scrutiny* (our emphasis) to the circumstances of his testimony, his demeanor on the stand, his relation to the government or to defendants, the manner in which the verdict might affect him, and the extent to which he is contradicted; and that they could consider promises of immunity or hope of reward in weighing the credibility of the witness, and the effect of any false testimony they might find on other testimony of the witness. The instruction told the jury of its right to examine the evidence "closely and carefully in the light of the common knowledge and experience of mankind * * * and your own" in determining credibility.

The court was clearly correct in rejecting Faulkner's instruction naming witness Evans. And in different words the substance of Gayles' instruction was covered.

Defendants admit that Evans' history as an addict was brought out "with commendable candor" by the government and there is no complaint that cross-examination of him was unduly limited. Defendants' expert witness' opinion was that Evans testified "to the best of what

would be his normal ability," and government's expert's testimony would justify the inference that Evans had "kicked the habit" several months prior to testifying.

Fletcher v. *United States*, 158 F. 2d 321 (D. C. Cir. 1946), is distinguishable because the district court there refused to instruct the jury that the informer's testimony should receive greater scrutiny and care than the ordinary witness. The court of appeals pinned the decision to the "facts of this case" where the testimony of the informer, addict and dope peddler, was uncorroborated and the only testimony against Fletcher. And *People* v. *Bazemore*, 25 Ill. 2d 74, 182 N. E. 2d 649 (1962), is to the same effect. The inference here could be that Evans was not an addict, that his testimony had been corroborated, and that the instruction was sufficiently cautionary. The dictum in *Fletcher* about "the well recognized fact" of an addict being "inherently a perjurer" is not pertinent. Here, under the instruction the jury knew Evans' testimony should be carefully scrutinized. The circumstances here do not fall under the reversible error test laid down by the court in *Phelps* v. *United States*, 252 F. 2d 49, 53 (5th Cir. 1958).

We see no merit in the contention that the district court committed reversible error by refusing to give the instructions tendered by Gayles and Faulkner.

The court's instruction is criticized too for stating that "a witness is presumed to tell the truth * * *" and we are referred to Judge Brown's concurring opinion in *Knapp* v. *United States*, 316 F. 2d 794 (5th Cir. 1963), where the only witnesses were government witnesses. The majority did not reverse; it did not approve the instruction on the facts there. What Judge Brown said, with no idea of reversible error, of the "presumed to tell the truth" statement was said in relation to an accompanying instruction and we think does not relate to the instruction here.

We see no need of discussing other claims of error in the giving, or refusing, of other instructions. We have

considered the claims and find that the court's instructions included in substance all proffered instructions that were proper and that the instructions given were not erroneous.

The rule in *Falcone* v. *United States*, 109 F. 2d 579 (2d Cir. 1940), *affirmed* 311 U. S. 205, does not apply to render reversible error the testimony of Wilson regarding Gayles and Spurlark, and testimony of Mardis as bondsman. Neither does the hearsay rule exception discussed in *Krulewitch* v. *United States*, 336 U. S. 440 (1949), nor the rule in *Greenwood* v. *United States*, 353 U. S. 391, 401-04 (1957), apply to the testimony of Evans against Gayles. These items of evidence in the context of all the evidence, related above, render the rules inapplicable; the jury could conclude the events testified to were in furtherance of the conspiracy, not merely legitimate transactions; and not a "subsidiary conspiracy" of events after the alleged conspiracy ended. And we see no error in the cross-examination of Gayles about the Morticians Association and see no reversible error in the cross-examination about his trips with other men, and women not their wives.

In view of *United States* v. *Garfoli*, 324 F. 2d 909 (7th Cir. 1963), and because of what was sought, we see no abuse of discretion in the trial court's denial of Green's motion for a bill of particulars.

Various other alleged errors, asserted by the different defendants, have been considered, but we find them to be without substance. We find no reversible error as to any of the defendants.

The judgments are AFFIRMED.

Petition for Rehearing denied on March 9, 1964.

* * * * * *

Section 174, Title 21, United States Code

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. . . .
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

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No. 974

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963

NATHANIEL SPURLARK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SPECIAL NOTE:

The judgment of the Court of Appeals which affirmed the lower court judgment; and the order denying the Petition for Re-hearing, are both contained in the joint certified record being sent to the Supreme Court along with this petition, for and on behalf of all petitioners.

Also, the certified copies of the Joint Appendix filed and used in the Court of Appeals are being sent to this Supreme Court along with this petition, for and behalf of all petitioners. 17

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IN THE

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OCTOBER TERM, A. D. 1963.

No.

NATHANIEL SPURLARK,

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Nathaniel Spurlark, petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on February 12, 1964.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in full in the Appendix to this petition. It is reported in 327 Fed. 2d 715. It is likewise set forth in full in the certified copy of the record filed in this Court.

The judgment of the United States Court of Appeals also appears in the certified copy of the record, along with the order denying the petition for re-hearing. Both the opinion and the Judgment of the United States Court of Appeals for the Seventh Circuit, affirmed a judgment previously entered by the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1), 62 Stat. 928; and Rule 19, Section 1(b) of the rules of the Supreme Court of the United States. The judgment of the Court of Appeals was entered on February 12, 1964; and a petition for rehearing was denied on March 9, 1964.

QUESTIONS PRESENTED.

1. Whether or not the Government may produce a witness for whom it vouched, and then when the witness testified that he was before the Grand Jury accompanied by an unauthorized person, to wit: a narcotics agent, and this testimony is so favorable to the defense that a mistrial is in order, and clearly indicated,—may the Government then and there summarily take the witness off the stand; proceed to put on evidence to impeach its own witness, by attempting to show that said witness was not before the Grand Jury and is unworthy of belief on this question; and by attempting to show further that the witness did not really mean what he actually said; albeit, the witness swears that he was before the Grand Jury; that the agent was present before the Grand Jury; that while witness was testifying, his testimony was halted; he went out of the Grand Jury room, gave another statement to the agent; and then returned to the Grand Jury with the agent for the completion of his testimony.

2. Whether or not a Court of Appeals may completely disregard an assignment of error which points out approximately 100 specific instances where prejudicial error has occurred during the course of the trial, this being the very first point raised in the Court of Appeals brief of the petitioner Spurlark; and where said point was completely unanswered by the Government in brief or oral argument, and where the claim was made by petitioner in the Court of Appeals brief that the sum total of these prejudicial rulings denied him a fair trial, and denied him due process of law under the Constitution of the United States.

3. Whether or not the Government, under an indictment charging only one overall conspiracy, may prove a group of separate conspiracies without showing a connecting overall rim around the spokes which constitute such separate conspiracies. That is to say, may the Government's evidence which shows that men, engaged in the narcotics traffic, are actually and factually competitors with each other for the narcotics business and are actually stealing each other's customers; may this nevertheless sustain an inference that these narcotics competitors are engaged in a joint narcotics conspiracy, simply because each one, on one occasion only, referred to the other as his partner; particularly where the evidence also shows that they were actually business partners in a legitimate Mortician's Association, and other legitimate business enterprises; but as stated, they were competitors with each other in the narcotics field.

4. Whether or not felons, narcotics addicts, and narcotic users are, like other credible witnesses, so far presumed to tell the truth, that no cautionary instructions specifically referring to the kind and character of their testimony, should be given to the jury.

5. Whether or not defendants may be convicted of conspiring to fraudulently and knowingly import and bring into the United States narcotics drugs, without one word of evidence in the record as to importation; and without one fact or circumstance in evidence, in the record, pertaining thereto.

6. Whether or not the Government, while preparing a case for trial and while actively investigating suspected narcotics traffickers, may deliberately and intentionally destroy evidence pertaining to such case; especially where the Government had at the time of the destruction of the evidence every reason to believe—based upon its investigation—that an indictment would be returned and that the case would proceed to trial, and that the evidence could be introduced.

7. Whether or not the Government may characterize a person in an indictment as a co-conspirator but not a co-defendant, and thus obtain the benefit of testimony which would otherwise be hearsay and clearly incompetent, except that it be given by a co-conspirator; where all the evidence shows that said person was not a co-conspirator.

8. Whether or not statements which ought to be furnished under Section 3500, are deliberately destroyed, and the witness who gave the statement is still allowed to testify over objections and motions to strike, simply because the Government agent who wrote up the statement elects to characterize the statement as "sketchy notes", unintelligible to anyone except the agent; but where the evidence shows conclusively that anyone of ordinary intelligence would understand said so-called "sketchy notes".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provision involved herein is the "due process" clause of the Fifth Amendment to the United States Constitution.

The statutory provisions involved are to wit: Section 174, Title 21 U.S.C.A., as amended by the Narcotic Control Act of 1956; and Section 3500 of Title 18 U.S.C.A. These provisions are set forth verbatim in the Appendix.

STATEMENT OF THE CASE.

Nathaniel Spurlark, Dennis Green, Gladys Davis, Arthur Faulkner, Jr., and Edward R. Gayles, were indicted September 2, 1959 by a Federal Grand Jury. The trial in the district court lasted thirteen days and all defendants were found guilty.

The witnesses against Spurlark testified that either Spurlark, or Katie Lewis or Gladys Davis or Willard Jones, all working under Spurlark, sold narcotics to them. The Government's evidence likewise showed that Spurlark, Green and Faulkner were partners in a Morticians' Underwriters Association which financed burials, and was legitimate in every respect. That Green likewise sold narcotics, according to the evidence, to Evans and to Faulkner.

The Government's evidence then showed that Green was trying to outbid Spurlark for Wilson's business; and was deriding the quality of Spurlark's merchandise, because Spurlark watered down his product more than did Green (App. 95). And at the same time, Spurlark was competing with Green endeavoring to outbid Green for Evan's business, with Spurlark praising his narcotic commodities over Green's (App. 230).

During the trial Government witness Evans testified that he appeared before the Grand Jury; that narcotics agent Valentine was in the Grand Jury with him. He first said he believed that Valentine was there, but was not sure; then he said "Yes, he was there." (App. 258). The evidence further was that Valentine took Evans out of the Grand Jury Room; took a second statement from Evans; and returned into the Grand Jury room with Evans (App. 258. At this point, Evans was withdrawn by the Government from the witness stand for the time being and Agent Valentine was called and testified that he, Valentine, was not in the Grand Jury Room on either occasion, nor at any time when any witness was testifying in the Grand Jury Room (App. 263-624).

Of those who testified, the key prosecution witnesses had been convicted of various felonies, or were users of narcotics, or both. For example:

Noble R. Thigpen was a felon and a user of narcotics as recently as three months before his testimony on the witness stand (App. 53, 63). Woodrow Wilson was a felon and trafficker in narcotics and smoked marijuana (App. 103-104). Mrs. Elaine Wilson said she and her husband smoked marijuana (App. 131). William Smith was a felon and convicted narcotics peddler (App. 189-190). Charles Price Webb was a convicted felon, for involuntary manslaughter and burglary (App. 191). Minnette Maljohn had served time on four felonies and had been convicted of so many felonies, she could not remember them (App. 198). Willard Evans had previously been an addict (App. 227); used heroin in his veins as recent as a couple of months before his testimony on the witness stand (App. 256); and he burglarized a grocery store after he made his statement to the Government (App.

268). Also he used heroin on the day two years earlier when he made his statement to the Government agent; and also the night before the statement, as well as the day before his Grand Jury appearance (App. 271). Rouzer was a felon, serving time for narcotics possession and had been convicted once for narcotics conspiracy, a felony. He purchased cocaine and used some, sold some and gave some away (App. 301, 302).

The Government's evidence further showed that Willard S. Evans, the Government witness, made two statements whereas the Government only furnished one statement under Section 3500 (App. 247, 254, 257; 298-300).

Government witnesses Philip R. Smith and Bernard A. Theisen testified to the making of notes first, and a statement thereafter. They did not produce the notes which were characterized as "sketchy notes". (App. 132-148, especially 142).

The evidence likewise showed that the Government destroyed many exhibits about which witnesses had testified. Objections were made to the introduction of any evidence, by way of Stipulation or otherwise, concerning destroyed evidence; and further objection was made that the Government regulations for destroying evidence was not followed (App. 160; Tr. 918-929).

Moses Winston Mardis testified that his connection with Spurlark consisted of wanting to borrow money from Spurlark to enter the bail bond business, a purely legitimate undertaking; that there was nothing illegal in the whole case that he participated in or discussed or had anything to do with (App. 222).

The evidence for the petitioner Spurlark was that his reputation for being a peaceable and law abiding citizen for over the past twenty years was good (App. 374-376); that Spurlark was neither prosecuted for nor convicted of any of the activities testified to by Agent George William Abraham (App. 378).

It was further shown that Spurlark was a legitimate Taxi-cab owner (App. 185); that he was likewise a legitimate automobile salesman (App. 247).

REASONS FOR GRANTING THE WRIT.

Certiorari is prayed for on five basic grounds, each of which will be concisely developed hereafter.

1. The Court of Appeals has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The Court of Appeals itself has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The Court of Appeals itself has decided an important federal question in a way in conflict with the applicable decisions of this Court.

4. The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

5. The Court of Appeals has decided three important questions of federal law which have not been, but which should be, settled by this Court.

I.

THE COURT OF APPEALS HAS SO FAR SANCTIONED A DEPARTURE BY A LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

This proposition presents a case of very first impression, in so far as diligent research on our part has brought forth, and is therefore of the utmost importance. Nowhere have we been able to find any case remotely

resembling the case at bar under this point, and we urge this Court to say that the Government may not first vouch for a witness, then put that witness on the stand and ask the jury to believe the testimony of such witness so long as it convicts the defendants; and then when the witness says that he and an unauthorized agent were before the Grand Jury and had thus given evidence favorable to the defendants—it is our earnest contention that the Government may not then stop the trial temporarily, proceed to rebut and impeach its own witness for whom it has just vouched; and ask the Court and the jury to disbelieve the witness on the one fundamental point which was beneficial to the defendant.

This was a fundamental departure, by the lower court, from the accepted and usual course of judicial proceedings; and it was sanctioned by the Court of Appeals and apparently was considered by the Court of Appeals to be so insignificant that no mention thereof was made in the opinion. The exercise of the Supreme Court's power of supervision is called for in this case. As has been said:

> "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach.
>
> * * *
>
> "Nor does it avail respondent to contend that the defendant's guilt was clearly established.
>
> * * *

The doctrine must never be adopted in America that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade the court of defendant's guilt.

II.

THE COURT OF APPEALS ITSELF HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The brief of Spurlark in the Court of Appeals earnestly urged under his first point that he had not received a fair and impartial trial in violation of his constitutional rights, because of the many prejudicial errors at the trial. Approximately 100 of such prejudicial errors were pointed out covering thirteen pages of the printed brief. The Government in its brief did not answer nor challenge this assignment of error. And the Court of Appeals simply ignored it; thus departing so far from accepted and usual judicial proceedings as to call for an exercise of this Court's power of supervision.

In *Alford* v. *U.S.*, 282 U.S. 687, wherein the trial court erroneously limited cross examination, the reviewing court reversed. In *Krulewitch* v. *U.S.*, 336 U.S. 440, where hearsay testimony abounded as in the case at bar; and in *Mayola* v. *U.S.*, 71 F 2(d) 65 where acts, activities and conversations, not being in furtherance of the common design, were admitted into evidence as in the case at bar, all constituted reversible error. See also *Bollenbach* v. *U.S.*, 326 U.S. 607, at 614-615; and *U.S.* v. *Cirmo*, 267 F. (2d) 345.

A reading of the opinion of the Court of Appeals in conjunction with the brief of the Government filed in the Court of Appeals, is very disturbing. It appears that the Court of Appeals analyzed and discussed only the points raised in the brief of the Government; and it further appears that where the Government ignored a

point made by one of the defendants; or where the Government did not condescend to answer the defendant's arguments, then in these cases the Court of Appeals followed the Government's brief and likewise declined to discuss our assignments of error and declined to give to the defendants the benefit of the judgment of the Court of Appeals on these questions. Due process of law, or just plain fairness, demands that the defendants be given the benefit of the decision of the Court of Appeals—independent of whether or not the Government condescends to answer the defendant's argument. The defendants have not been accorded due process of law by the assertion in the last paragraph of the opinion that various other errors have been considered but found to be without substance. Constitutional questions are matters of substance; and this is true even if the decision should be against the defendants; constitutional questions are still matters of substance. Repeating, due process demands that they not be brushed aside with the assertion that they have been considered but are without substance.

III.

THE COURT OF APPEALS ITSELF HAS DECIDED AN IMPORTANT FEDERAI QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

There is more than one conspiracy in this case if the Government's evidence is true. And they emanate, if the Government evidence be true, as spokes from two hubs instead of one hub. One hub is Spurlark on the South Side and the other is Green on the West Side; but there is no overall rim around these spokes as they come out from either hub.

In *Kotteakos* v. *U.S.*, 238 U.S. 750 at page 775, it is held:

> "As the government put it, the pattern was 'of separate spokes meeting in a common center' though we may add, without the rim of the wheel to enclose the spokes.
>
> "The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment."

Also see *Kotteakos* v. *United States*, 336 U.S. 440.

IV.

A COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

The Court of Appeals in the case at bar has held that it is not necessary to give any kind of cautionary instructions which particularly call to the attention of the jury the fact of narcotic addiction or narcotic use or conviction of felony; and the Court of Appeals opinion assumes that felons and narcotic addicts and narcotics users are, like other decent respectable citizens, presumed to tell the truth. However, in *Fletcher* v. *U.S.*, 158 Fed. 2nd. 321 (D.C. Cir. 1946), the Court, at page 322, held in regard to a narcotic addict:

> "No other motive than his own advantage impelled him in all that he did, and when to this is added the well recognized fact that a drug addict is inherently a perjuror where his own interests are concerned, it is manifest either that some corroboration of his testimony should be required or at least that it should be received with suspicion and acted upon with caution."

The opinion in the case at bar refers to the above expression as "dictum". Dictum or not, it is sound, rational and pointedly correct; and this Court should unhesitatingly reconcile the two conflicting Court of Appeals opinions; and we therefore ask the Court to disregard the opinion in the case at bar which holds that this fundamental truth, cited above, is mere dictum; but on the contrary, we ask this Court to say that it is sound law and that the jury ought to have been so told.

V.

THE COURT OF APPEALS HAS DECIDED THREE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

One of the allegations in the indictment was that defendants conspired to fraudulently and knowingly import and bring into the United States narcotic drugs knowing them to have been imported and brought into the United States contrary to law. We assigned as error in the Court of Appeals, the fact that no evidence nor any facts or circumstance in regard to importation was found in the record. The Government did not answer this assignment of error, and the Court of Appeals simply ignored it. It was also raised by co-defendant Green; and went unanswered and ignored. In the absence of any testimony concerning importation of the narcotics, either legal or illegal, we may guess that the Government relied upon the presumption which is allowable by the statute in some cases but which presumption standing by itself without any evidence of importation or without any fact or circumstance in regard thereto supporting the presumption, or on which to base the presumption, certainly is not a substitute for proof beyond a reasonable doubt that the defendant conspired to fraudulently and know-

ingly import the drugs into the United States. *United States* v. *Massiali*, 307 F. 2d 62 (1962); *Kalous* v. *U.S.*, 9 F 2nd 368 at 370.

The Statute makes possession prima facie evidence for the Government, but we earnestly urge that it was never the Congressional intent to make physical possession prima facie evidence of a conspiracy. A conspiracy being an agreement, there need never be any possession involved in order for two or more people to verbally agree or to agree by acts and conduct. Congress never had this intent in mind and on this point this is a case of first impression.

Next we claim prejudicial error was committed in the destruction of exhibits. While preparing this case for trial, and collecting exhibits all over the middle west in the course of its investigation, the Government then destroyed most of the exhibits which, in fairness should have been preserved and made available for inspection by counsel for the defendants preparatory to cross examination regarding them. This was necessary in the interest of protecting the defendants. It is earnestly contended that this conduct does not meet that standard of fairness which is essential to due process of law; and that this kind of conduct offends one's sense of fairness and justice, as those terms are understood in English speaking countries. The question as to whether or not the Government may spend years collecting exhibits for use in a criminal prosecution, and then destroy them before trial has not been determined by this Court as far as we can find by diligent research; and so the Supreme Court should settle this question for all time. It is highly significant that the Government did not introduce into evidence the rules and regulations pertaining to destruction of exhibits, so that the defendants

on trial for their liberty would know that they had been accorded due process of law in the destruction of evidence; evidence upon which they could lose their liberty. In other words, the administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach; and a defendant in a criminal case must know that he has had a fair trial; or at least no reasonable grounds should exist from which he could conclude that he has not had a fair trial. And a defendant has not had a fair trial where his Government destroys, before trial, the evidence which he might explain so satisfactorily that it would prove his innocence. This too is a case of first impression.

Finally, under Section 3500, a defendant is entitled to inspect statements that are made by witnesses against him. This is axiomatic. In the case at bar, the witness Phillip R. Smith testified that he made "sketchy notes", and that no one else could understand them. On cross examination it appeared that these "sketchy notes" which he deliberately destroyed contained names of customers, addresses where the witness Elaine Wilson resided, trips that she had made, her source of supply, and the quantities she purchased—all of which were named on the document which was characterized as "sketchy notes" and which any person of normal intelligence would understand. He had planned to reduce these "sketchy notes" to writing and to offer it to the witness for her signature, but he did not recall and did not believe that he had carried out his plan. He never did say under oath that he had or had not carried out his plan (App. 143-145).

Petitioner Spurlark hereby adopts every argument, every question presented, and every reason for granting the writ, that has been urged in the petitions filed in this Court by his co-defendants.

CONCLUSION

The judgment of the Court of Appeals which affirmed the lower court judgment; and the order denying the Petition for Re-hearing, are both contained in the joint certified record being sent to the Supreme Court along with this petition, for and on behalf of all petitioners.

Also, the certified copies of the Joint Appendix filed and used in the Court of Appeals are being sent to this Supreme Court along with this petition, for and on behalf of all petitioners.

Because of the above, petitioner earnestly prays that the Writ be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NOS. 13849-13853

SEPTEMBER TERM, 1963 JANUARY SESSION, 1964

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DENNIS GREEN, *Defendant-Appellant.* — No. 13849	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GLADYS DAVIS, *Defendant-Appellant.* — No. 13850	
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ARTHUR FAULKNER, JR., *Defendant-Appellant.* — No. 13851	
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. EDWARD R. GAYLES, *Defendant-Appellant.* — No. 13852	
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. NATHANIAL SPURLARK, *Defendant-Appellant.* — No. 13853	

FEBRUARY 12, 1964

Before HASTINGS, *Chief Judge*, KNOCH and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge*. Appellants appeal from their conviction, by a jury, after a thirteen day trial on an indictment charging a conspiracy to violate the narcotics law.[1] The five appeals were consolidated in this court.

In deciding the issue whether there was evidence upon which the jury could infer guilt of defendants beyond a reasonable doubt, we must take the testimony and reasonable inferences most favorable to the government. *United States* v. *Glasser*, 315 U. S. 60, 80 (1942). *United States* v. *Miccle*, ... F. 2d ..... (7th Cir. Nos. 14145-49, January 8, 1964).

Thigpen,[2] at defendant Spurlark's direction, purchased narcotics from Katy Lewis from 1951 through 1956. After her death in 1956 Spurlark directed Thigpen to purchase from defendant Willard Jones.[3] In 1958 Spurlark directed him to pick up narcotics from defendant Gladys Davis. In 1958 Thigpen twice sold narcotics received from Spurlark to Narcotics Agent Bailey. From 1952 to 1955 witness[4] Wilson purchased narcotics from Spurlark and Lewis. He also arranged for his wife to purchase from them. Later Wilson bought narcotics from defendant Green and Green told him "you know Teo [Spurlark] and I are in business together * * * my partner." Witness William Smith purchased narcotics from Spurlark in 1953 and 1954 and thereafter from Katy Lewis until her death. After her death, Smith, at Spurlark's direction, bought narcotics from Jones and then from Gladys Davis. From 1952 to 1954 Evans[5] bought narcotics from Green, and later from Spurlark and Katy Lewis. In 1955 Spurlark told witness Mardis that he was putting Green "in charge of all activity on the west side."

In 1955, in a conversation at which Evans, Green, Spurlark and Mardis were present, Evans was told Green was

---

[1] A conspiracy in violation of 21 U. S. C. § 174.

[2] An unindicted co-conspirator.

[3] Appellant in No. 13854, not consolidated with these causes.

[4] "Witness," as used in this opinion, designates those who are neither defendants nor unindicted co-conspirators and who testified at the trial.

[5] An unindicted co-conspirator.

to take over the sale of narcotics on the west side. Late in 1955, with Green's permission, Evans and defendant Faulkner "combined" their business for the sale of narcotics on the west side for a few months. In June of 1956 Faulkner and Spurlark brought narcotics back from New York to relieve a "shortage" in Chicago. Evans purchased narcotics from Green from 1955 to 1959 except for a two month period when, in Green's absence, he bought from Faulkner.

Witness Rouzer of Detroit made several purchases from Spurlark in 1955. In 1958, at Spurlark's direction, Rouzer twice went to Gladys Davis' apartment to await narcotics deliveries. And twice Spurlark sent Gladys Davis to Detroit to get money from Rouzer for Spurlark.

It is needless to detail more of the testimony which amply justified the jury in the inference that at the center of this narcotics web was Spurlark, holding it together, and operating from the Rodeo Lounge on Chicago's south side, through Dennis Green, Evans and Faulkner on the west side, and through the late Katy Lewis, Jones and Gladys Davis on the south side.

The testimony against defendant Gayles, an attorney, did not link in any way with the sale or distribution of the narcotics. There is testimony favorable to the prosecution, however, and the inferences the jury could reasonably draw, to show that he was more than an attorney for the defendants; and that he knowingly participated intentionally, *Direct Sales Co.* v. *United States*, 319 U. S. 703, 711 (1943), in aiding his co-defendants, and others, from late 1954 to 1959, in carrying out their illegal enterprise: "After 1953" he was a manager, along with defendant Green, in the Morticians Underwriters Association, in which Spurlark and Faulkner had made investments. Gayles was present at the meeting and conversations in his home attended by Spurlark, Wilson, and police officers who were planning the arrest of "Big John," a competitor of Spurlark's whom the latter said "some people" wanted to "bust." Gayles told Thigpen, an addict and peddler

whom he represented, that for $125 per month he could see that the police did not bother Thigpen again. Gayles told Wilson to be careful about telephones and tape recorders, and to use gloves when handling packages because the police "will be trying to get" him. Gayles told Evans and Faulkner to stay away "from around the Setup" tavern because police officers were looking for them. He told Evans that he would need "five hundred" to fix a case, after confirming that Green would vouch for the money.

There is no merit to the contention of defendants that more than one conspiracy was shown, to their prejudice, by the evidence, or that the evidence showed merely a number of unrelated episodes.[6] There is testimony to show that Spurlark, beginning in 1952, was the source from which the narcotics flowed to his south and west side minions; and that Gladys Davis, Evans and Faulkner operated to some extent on both the south and west sides of the distribution structure. The jury could infer from this evidence that each defendant knew, or should have known, of the conspiracy. *United States* v. *Poliafico*, 237 F. 2d 97 (6th Cir. 1956), *cert. denied*, 352 U. S. 1025 (1957). It was not necessary that each co-conspirator knew all others or that each witness mention all, or that each one be involved throughout the entire span of seven years. *United States* v. *Miccle*, ... F. 2d ..... (7th Cir. Nos. 14145-49, January 8, 1964). A fluctuation of the membership during the span of this record of continuous activity cannot be compared to the facts in *United States* v. *Russano*, 257 F. 2d 712 (2d Cir. 1958), where the evidence established two conspiracies, with a break between the two. The rule in *Kotteakos* v. *United States*, 328 U. S. 750 (1946), is not applicable here, because the evidence shows but one conspiracy with Spurlark at the center and several conspirators radiating from him. The trial court properly denied motions for severance on grounds of variance or misjoinder.

[6] For example, the sale by Spurlark to witness Minnett Malichn in 1958, who took the purchased goods to Davenport, Iowa, established that the "white powder" Spurlark was selling was heroin hydrochloride.

Since the cases of Johnson and Williams were severed during trial, there is no merit of Gayles' contention of prejudicial joinder. The court, in ruling against Gayles' proffer of testimony of his pre-conspiracy participation in arrests of co-defendants, weighed the probable prejudice to Spurlark and Green against the probable gain to Gayles from the testimony. We see no abuse of discretion in the ruling, and cannot see error in denying him a severance because he could not, otherwise, introduce the testimony.

Gayles proffered an instruction which told the jury that Gayles' representation of co-defendants for narcotics violations was insufficient to prove his participation or membership in the conspiracy. It then went on to state, in the abstract, rights and duties of attorneys[1] in defense of alleged violations of law. The trial court read this instruction as tending to direct a verdict of not guilty, and added the following cautionary paragraph:

> "You are not to infer from the foregoing however, that an attorney has any special status which permits him to perform an unlawful act, or to join an unlawful conspiracy, nor may he knowingly assist a client to commit an unlawful act or to further an unlawful conspiracy."

We cannot say the court misread the proffered instruction, nor that the modification directed a guilty verdict or otherwise prejudiced Gayles, nor that the paragraph was without an evidentiary basis.

Gayles tendered an instruction dealing generally with jury's consideration of the use of narcotics as an element

[1] "It is the right and duty of a lawyer to undertake the defense of a person accused of a crime, regardless of his personal opinion of the guilt of the accused. Otherwise, innocent persons, victims only of suspicious circumstances may be denied proper defense.

"Having undertaken such defense the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the ends that no person may be deprived of life or liberty, except by due process of the law.

"Under the law an attorney may not reveal or disclose to law enforcement agencies or to anyone, any information revealed to him by his client. And the fact that an attorney does not inform or advise law enforcement agencies of any information revealed to him by a client is not in any way to be taken or construed against said attorney."

in determining credibility. Faulkner offered an instruction naming government witness Evans as a ten-year addict prior to August, 1961, and stating his testimony should be received with "extreme caution and suspicion" and be given serious consideration only when corroborated. The court refused to give these instructions.

The court gave thorough instructions regarding credibility and weight of testimony, beginning:

> "You have heard much discussion of the question of the credibility and weight you are to give to the testimony of the particular witnesses. Let me be as explicit as I can on that."

The instruction went on to inform the jury that they were "sole judges" of credibility; that the presumption that a witness speaks the truth is rebuttable by the manner in which he testifies, the character of his testimony, or contradictory evidence; that in weighing the testimony of each witness they were to give *careful scrutiny* (our emphasis) to the circumstances of his testimony, his demeanor on the stand, his relation to the government or to defendants, the manner in which the verdict might affect him, and the extent to which he is contradicted; and that they could consider promises of immunity or hope of reward in weighing the credibility of the witness, and the effect of any false testimony they might find on other testimony of the witness. The instruction told the jury of its right to examine the evidence "closely and carefully in the light of the common knowledge and experience of mankind . . . and your own" in determining credibility.

The court was clearly correct in rejecting Faulkner's instruction naming witness Evans. And in different words the substance of Gayles' instruction was covered.

Defendants admit that Evans' history as an addict was brought out "with commendable candor" by the government and there is no complaint that cross-examination of him was unduly limited. Defendants' expert witness' opinion was that Evans testified "to the best of what

would be his normal ability," and government's expert's testimony would justify the inference that Evans had "kicked the habit" several months prior to testifying.

Fletcher v. *United States*, 158 F. 2d 821 (D. C. Cir. 1946), is distinguishable because the district court there refused to instruct the jury that the informer's testimony should receive greater scrutiny and care than the ordinary witness'. The court of appeals pinned the decision to the "facts of this case" where the testimony of the informer, addict and dope peddler, was uncorroborated and the only testimony against Fletcher. And *People* v. *Bazemore*, 25 Ill. 2d 74, 182 N. E. 2d 649 (1962), is to the same effect. The inference here could be that Evans was not an addict, that his testimony had been corroborated, and that the instruction was sufficiently cautionary. The dictum in *Fletcher* about "the well recognized fact" of an addict being "inherently a perjurer" is not pertinent. Here, under the instruction the jury knew Evans' testimony should be carefully scrutinized. The circumstances here do not fall under the reversible error test laid down by the court in *Phelps* v. *United States*, 252 F. 2d 49, 53 (5th Cir. 1958).

We see no merit in the contention that the district court committed reversible error by refusing to give the instructions tendered by Gayles and Faulkner.

The court's instruction is criticized too for stating that "a witness is presumed to tell the truth * * *" and we are referred to Judge Brown's concurring opinion in *Knapp* v. *United States*, 315 F. 2d 794 (5th Cir. 1963), where the only witnesses were government witnesses. The majority did not reverse; it did not approve the instruction on the facts there. What Judge Brown said, with no idea of reversible error, of the "presumed to tell the truth" statement was said in relation to an accompanying instruction and we think does not relate to the instruction here.

We see no need of discussing other claims of error in the giving, or refusing, of other instructions. We have

considered the claims and find that the court's instructions included in substance all proffered instructions that were proper and that the instructions given were not erroneous.

The rule in *Falcone* v. *United States*, 109 F. 2d 579 (2d Cir. 1940); *affirmed* 311 U. S. 205, does not apply to render reversible error the testimony of Wilson regarding Gayles and Spurlark, and testimony of Mardis as bondsman. Neither does the hearsay rule exception discussed in *Krulewitch* v. *United States*, 336 U. S. 440 (1949), nor the rule in *Greenwood* v. *United States*, 353 U. S. 391, 401-04 (1957), apply to the testimony of Evans against Gayles. These items of evidence in the context of all the evidence, related above, render the rules inapplicable; the jury could conclude the events testified to were in furtherance of the conspiracy, not merely legitimate transactions; and not a "subsidiary conspiracy" of events after the alleged conspiracy ended. And we see no error in the cross-examination of Gayles about the Morticians Association and see no reversible error in the cross-examination about his trips with other men, and women not their wives.

In view of *United States* v. *Garfoli*, 324 F. 2d 909 (7th Cir. 1963), and because of what was sought, we see no abuse of discretion in the trial court's denial of Green's motion for a bill of particulars.

Various other alleged errors, asserted by the different defendants, have been considered, but we find them to be without substance. We find no reversible error as to any of the defendants.

The judgments are AFFIRMED.

APPENDIX B

AMENDMENT V, OF THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, Section 3500, UNITED STATES CODE ANNOTATED

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant), to an agent of the Government shall be subject to subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates

to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall

strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" as used in subsections (b) (c) and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Title 21, Section 174, UNITED STATES CODE ANNOTATED

174. Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any kind of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 28, Section 1254, UNITED STATES CODE ANNOTATED

Courts of appeals; certiorari; appeal; certified questions

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

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FILED
APR 7, 1964
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No. 975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

DENNIS GREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I. As this was a closely contested case on the facts, it was error for the court to permit the jury to consider the government witnesses Noble Thigpen and Willard Evans as any other competent witnesses, notwithstanding they both admitted to being narcotic addicts for a good many years 20

It was not only error for the court to refuse to instruct in any manner that the jury should view with care and caution and extreme suspicion the testimony of a narcotic addict, but the error was compounded when the court advised the jury that "a witness was presumed to speak the truth." 20

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Considering the prevalence of narcotic prosecutions by use of informant addicts themselves amenable to the prosecution arm, certiorari should be granted in order that this court may guide the trial courts on how to instruct juries in the consideration of the testimony of admitted narcotic addicts. Although a number of circuits have spoken and a few of the state Supreme Courts, your Honors have not yet reviewed the issue 20

II. Was it not further error to refuse to instruct that the testimony of government witnesses who admitted their participation in crime should be received with suspicion and acted upon with care and caution? 29

III. Even in a conspiracy case the guilt of a defendant is individual. It was error for the court to instruct the jury that it may find the petitioner guilty even if he did not have knowledge of the details or means by which the object of the conspiracy was to be accomplished 31

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

DENNIS GREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE

To The Honorable Chief Justice and Associate Justices of the United States:

Your petitioner, Dennis Green, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURT BELOW

On February 12, 1964, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of conviction entered in the United States District Court for the Northern District of Illinois, sentencing defendant to

imprisonment for a term of five years. The Court of Appeals opinion as yet has not been reported. It is printed herewith as Appendix "A".

JURISDICTIONAL STATEMENT

On a jury trial defendant was convicted of conspiracy to violate the narcotic laws in violation of Section 174, Title 21, U. S. Code.

The judgment of conviction was affirmed on February 12, 1964; and a timely petition for rehearing was denied on March 9, 1964. (Appendix "B").

The jurisdiction of this court is invoked under the provisions of Title 28, U. S. Code 1254(1).

QUESTIONS PRESENTED

1. Where the facts in the case are closely contested and where the government's case against the petitioner rested almost solely upon the credibility of an admitted narcotic addict, was not due process violated when the court refused to submit properly the issue of the credibility of the witness to the jury under careful and appropriate instructions?

And was it not error to refuse to instruct the jury to take into consideration the fact that the government witness was a user of narcotics, under circumstances such as here?

2. In the face of refusal by the court to instruct the jury that it should scrutinize closely the testimony of a narcotic addict, was not the error compounded when the court advised the jury that "a witness is presumed to speak the truth?"

3. Where an appeal in a criminal case is a matter of right (*Coppedge v. United States*, 369 U.S. 438, 441), may the Court of Appeals ignore a claimed error on instruc-

tions by stating, "We see no need of discussing other claims of error in the giving, or refusing, of other instructions?"

Was it not error for the trial court to refuse to instruct, as requested, that the testimony of government witnesses who admitted their participation in crime should be received with suspicion and acted upon with care and caution?

4. Where the government chose to indict the defendant for conspiracy to import narcotic drugs contrary to law, knowing the same to have been unlawfully imported in violation of Section 174, Title 21, U.S. Code, in order to obtain the benefit of the presumption of knowledge of illegal importation from the fact of possession, may the government obtain the advantage of the statutory presumption when no proof of possession in the petitioner is shown?

May the Court of Appeals in its opinion ignore this claimed error when it failed to render its opinion on this point? And is not the holding in this case in conflict with the Second Circuit's holding in *United States* v. *Massiah*, 307 F. 2d 62 (1962). May the reviewing court effectively deny petitioner's right to a review in failing to render its opinion in connection with a claimed error to which another circuit has ruled adverse to the government?

5. Assuming uncritical acceptance of the government's case in its entirety, were not separate conspiracies shown *ala Kotteakos* v. *United States*, 321 U.S. 750 and, therefore, improperly joined?

STATUTES INVOLVED

Section 174, Title 21, U.S. Code (relevant portions set out in Appendix "C").

STATEMENT OF THE CASE.

Defendant Dennis Green was indicted on September 2, 1959 (A. 1) for conspiracy with defendants Nathanial Spurlark, Edward Gayles, Arthur Faulkner, Willard Jones, Gladys Davis, Cornelius Mack, Percy Jones and Floyd Williams to import narcotic drugs contrary to law, and to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of such narcotic drugs after being unlawfully imported, knowing the same to have been imported and brought into the United States, contrary to law in violation of Section 174, Title 21, United States Code (A. 7-8). The indictment charged the conspiracy commenced on January 1, 1952 and continued to the date of the indictment, September 2, 1959. Non-defendant co-conspirators named were Noble Thigpen, Willard Evans, Woodrow Wilson, Charles Webb, Moses Mardis and Katey B. Lewis, deceased (A. 7).* Of fourteen overt acts specified in the indictment, Dennis Green is mentioned in three of them: no. 5, that in November or December, 1955, he sold a quantity of heroin to Woodrow Wilson; no. 6, that in November or December, 1955, defendant Arthur Faulkner paid $6,000 to him in Chicago; and no. 10, that he had a conversation with defendant Gayles in September, 1957.

Green moved for a severance (A. 20) and for a bill of particulars (A. 2). The motions were denied.

*The printed Appendix as filed omitted Cornelius Mack from the names of defendants and, omitted Woodrow Wilson, Charles Webb and Moses Mardis as non-defendant co-conspirators.

THE EVIDENCE AGAINST GREEN.[1]

Government witness Woodrow Wilson testified he was released from the United States Army in October, 1955 after six months' service (A. 94). He saw defendant Green in the Rodeo Lounge a couple of months after he got out of the Army (A. 95). He told Green that (defendant) Spurlark was kind of sore at him because Spurlark found out the witness made a couple of buys in New York and Spurlark would not sell him any more stuff (A. 95). The witness asked Green what he could do about it and Green said that Ted (Spurlark) and he were in business together, that Ted was his partner (A. 95). The witness asked Green to get him some merchandise at a better price and Green said he would. The witness said he was buying a kilo or two every once in a while. Green told him to see Harriet Doyle and tell her that he had sent the witness (A. 95). Green said his stuff was going to cost $200, and that his stuff would be better than Ted's because Ted cuts his a little more. The witness went to Harriet's house and received an ounce from her for $400 (A. 95). A week later Harriet Doyle sold him another package of white powder for $400 (A. 95).

On cross examination, Wilson testified he knew Dolores Doyle, and that Harriet Doyle was his girl friend in 1955 before he went to the Army (A. 100). He engaged in narcotics with Dolores Doyle, the sister of Harriet Doyle in 1955 (A. 100-101). He knew Harriet and Dolores Doyle for a long period of time before he ever knew Dennis Green (A. 101). Harriet wouldn't do business with the witness without Green's okay (A. 101).

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[1] The evidence is set out fully to demonstrate the claimed error that there were separate conspiracies, taking the Government's case at its best.

He never received any narcotics from Green and never gave Green any money (A. 104). After he had a falling out with Spurlark, he selected Dennis Green because he had ceased operations with Spurlark and was looking around for somebody else (A. 105). Green said he could give the witness a better price and better merchandise (A. 105). Since he left the penitentiary in Michigan he had lived in Detroit and was unemployed.

Government witness Moses Winston Mardis testified he was a bail bondsman in 1954 and 1955. Two or three weeks after May, 1955, he spoke with Mr. Spurlark about financing himself in the bail bond business. Spurlark said that he would have to talk to Mr. Green (not otherwise identified) about it (A. 219). Again, in December, 1955, he had a conversation in Spurlark's home with Spurlark who was talking to him about the west side. The witness was trying to intercede for another gentleman to take over the business on the west side. He asked if Spurlark would turn his business over on the west side to a Mr. White, and Spurlark said, "No, I'm turning it over to a Mr. Green." (Not otherwise identified. A. 219). The witness asked Spurlark why not put Mr. White in charge, that he represents Mr. White and Spurlark said, "No, Dennis Green (not otherwise identified) is the man of my choosing." (A. 202).

(Green's lawyer moved to strike the testimony of Mardis on the ground that none of the conversations was pursuant to the conspiracy charge and further that the government may not establish a conspiracy against a so-called co-conspirator by evidence of conversations between two of the other co-conspirators out of the presence of that co-conspirator, but the motion was overruled. (A. 221).

On cross examination, Mr. Mardis testified he was not concerned with the west side transaction beyond the fact that it might be a purely legitimate matter and an opportunity for him to sign more bonds; that there was nothing illegal that he participated in or that he discussed (A. 222).

Government witness Willard Evans testified he was a narcotic addict (A. 227). He knew defendants Green and Faulkner. In January, 1952, he saw defendant Green in the vicinity of Damen and Lake. He told Green he wanted to buy some stuff and Green said an eighth of a kilo would cost $1,700. He gave Green the money and Green delivered the package to his mother's house, 2343 Warren Avenue (A. 228). He and his wife tested the powder, cooked some of the heroin and injected it into their veins. He cut the heroin and sold it to his different customers (A. 228). He saw Mr. Green after that about once or twice a week from 1952 off and on until 1959 (A. 228). In the second week of January, he saw Green in the Setup Lounge. He told Green he was ready to buy some stuff. He gave Green $1,700 and Green told him to meet him on Maypole in about an hour. He subsequently saw Green come out of a garage and give him a package of white powder. He took it home, tested it, mixed it up and sold it (A. 228-229). About a week or two after that, he saw Green again at the Setup Lounge around Oakley and Lake. He gave Green $1,700 and went around on Maypole and Green handed him a package of white powder. He cooked the white powder, injected some in his vein, mixed it up and sold it. From 1952 to 1954 he would get in touch with Green, and buy some stuff. He would sell it (A. 229). He stopped buying from Green for a while and then started buying again (A. 229).

Winston Mardis introduced the witness to Ted Spurlark in May, 1954 on 47th Street. Mardis told the witness that Spurlark would sell him some stuff if he could get the money. The witness told Spurlark he had the money and asked how much the stuff would cost. Spurlark said it would cost about $3,000 and that it would be good stuff, better than the stuff he had been getting from Green (A. 230). About ten days later, he saw Spurlark in the Rodeo Lounge and said he was ready to buy; Spurlark sent him to a young lady named Katy B. Lewis. He went to Katy's apartment and gave her $3,000. Later, she gave him a package of white powder which he took with him, tested, mixed, and sold it (A. 230-231). About every two weeks, he would get in touch with Spurlark, who would send him to see Katy B., who would give him a package of white powder in exchange for $3,000. He would test it and then sell it (A. 231). In July, 1954, he went to the Rodeo Lounge; Spurlark told him a federal agent was watching the lounge and that they should meet at 45th and South Parkway. They met there and he gave Spurlark $3,000 and a young lady by the name of Harriet, he thought, gave him a package of white powder (A. 232).

Early in 1955, at Mardis' house, Dennis Green, Winston Mardis, Ted Spurlark and Jimmy White were present. "Well, we was talking about Dennis Green was going to take over the sale of narcotics on the west side, and everybody who was buying stuff from over there would have to buy it from Dennis Green." (A. 232).

In November or December, 1955, he saw defendant Faulkner at the Mambo Lounge, 1900 block on Lake Street. He talked to Faulkner about lowering the prices on narcotics because he and Faulkner were undercutting each other. He thought it would be a good idea if they could combine their business and make it one operation, and Faulkner also thought it was a good idea. They called

Dennis Green, who came over, and Green also said it was a good idea (A. 233). Green came to the lounge and Faulkner told Green that the witness and Faulkner were going to combine their business in the sale of narcotics on the west side. Green said it was all right with him and said that he would sell them a half kilo for $6,000 (A. 233). About ten days later, near 63rd and Loomis, Faulkner, Green and the witness met. The witness gave Green $6,000. Green told them to meet him in an alley in about fifteen minutes. They met, and Green gave a package to the witness which he gave to Faulkner (A. 233). Faulkner and the witness brought the package to Karlov near 16th Street, where the stuff was tested, mixed and distributed out to be sold (A. 233).

In April 1956, he had broken up partnership with Faulkner and saw Dennis Green again and said he wanted to buy stuff on his own (A. 235). Green said it would be the same price, $3,000 for a quarter kilo of heroin. He met Green in April, 1956 on Maypole near Western and gave Green $3,000 and received a package of white powder which he cooked, tested, mixed and sold to his customers (A. 235). In June, 1956, at the Setup Lounge Green told him there was a shortage of narcotics and he didn't have any and would let him know when he could get some. He next saw Green after the Moloott-Marciana *(sic)* fight around Oakley and Lake in 1956. (Green said Ted Spurlark and Faulkner went to the fight and they came back and the stuff was in. That was the latter part of June). Green told the witness to meet him around Maypole and they met, he gave Green $3,000 and Green gave him a package (A. 236). It took him a week or two to sell a quarter kilo of heroin (A. 236).

He saw Mr. Green off and on from 1956 to 1959 (A. 236). During the period when he was not seeing Green, he saw Faulkner about once a week or every other week. Green

told the witness he was going to California and that Faulkner would take over the business while he was gone (A. 237). After he stopped seeing Faulkner, he started seeing Green again. He would tell Green he wanted to get some stuff. Green would tell him to bring the money and Green would deliver the package of white powder. The witness would take it, test, mix and sell it to his customers (A. 237). That was between July and August, 1956.

In August, 1959, at Western and Madison Street, Green, Dorothy Watson and the witness had a conversation in which Green said he was leaving town because he figured a grand jury investigation was coming. They arranged for the sale of some stuff for $1,000 through his girlfriend. Dorothy called him and told him to go to her sister's house near Washington Boulevard and Western and that her sister would give him a package. He went there, gave her $10, and she gave him a package of white powder which he tested, mixed and sold (A. 238). He was arrested in August, 1959 by the state narcotic agents with five ounces of heroin, which he obtained from Dennis Green (A. 239).

At the meeting in Mardis' house in 1955, Spurlark and Green discussed the payments of fees for police protection. Green told him later, his fee was $300 per month and he made payments until 1957 (A. 244-245).

Evans further testified he was a narcotic addict for about ten years off and on, the last time being August, 1961. He was a registered narcotic addict and the narcotics he used up to 1961 were purchased in the illegal market after he had given the government a statement (A. 245). He used narcotics once or twice a day until August, 1961 (A. 246).

The last time he took heroin in his veins was two or three months prior to his testimony (A. 256).

On further cross examination, the witness stated that narcotic agent Valentine was in the grand jury with him when he testified before that body (A. 258). In the statement he gave to the government agents he told them about the payment of $6,000 in the transaction between himself and Faulkner and Green, but that incident was not in the statement. He told the grand jury the incident about the $6,000 (A. 258).

(The defense made a motion to dismiss the indictment on the ground that it affirmatively appeared there was a stranger in the grand jury room while the government witness Evans was testifying. A. 261).

The motion was denied.

The witness was at the Haines Grocery, 2300 Lake Street, burglarizing it after he made a statement to the government and he was due to go to court for that offense on March 26, 1962 (A. 268).

On further cross examination, the witness stated he took heroin a few times after August, 1960. He smoked marijuana a couple of weeks before the trial (A. 269). He used heroin on the night prior to his testimony before the grand jury; and he used heroin on the day he made the statement and spoke to agent Valentine (A. 271).

On further cross examination, the witness admitted to using heroin, cocaine, morphine, marijuana, and codeine (A. 275). He took some cough medicine, Tussar which had codeine, the morning of his testimony (A. 275). He took a couple of big swallows from the bottle the morning of his testimony. (A. 276).

EVIDENCE PERTAINING TO THE OTHER DEFENDANTS

Government witness Noble Thigpen testified he had been a narcotic addict, but was not one now (A. 53). He used narcotics from 1949 to 1958 and started back occasionally (A. 53). Commencing in 1950 he bought about a fourth of an ounce of narcotics about once a week. He used some and sold the rest of it. He met Katy B. Lewis and started purchasing narcotics from her around 1951 (A. 56). (Objections by the defendants as being outside the indictment were overruled. A. 56). He met Katy B. through defendant Spurlark. He talked with Spurlark over the phone in 1951 and Spurlark told him to get narcotics from Katy B.'s house. (Objections as to the matters predating the indictment were overruled. A. 56). He picked up an ounce and later paid $3,000 to Spurlark. He made purchases about once a week from Katy B. Lewis until she died in 1956 (A. 56-57). When Katy died in 1956, he spoke to Spurlark, who then sent the witness to Willard Jones, who sold the witness narcotics a couple of times for $100 (A. 60).

He hired defendant, attorney Edward Gayles, to represent him in a narcotics case in 1953. Gayles represented him in court and he was discharged. Gayles said that for $125 per month he would see to it that the witness was not bothered by the arresting officers (A. 61). (Defense counsel moved for a mistrial on the ground that evidence of other crimes—that is, the alleged bribery of police officers—was prejudicial. The court denied the motion for the mistrial, but stated that he would strike the testimony of the witness and advise the jury to ignore it (Tr. 150-151). The court directed the jury to ignore and remove from its consideration any recollection of the conversation Thigpen had with Gayles respecting the pay-

ment of money on the ground that it was not relevant for the consideration of the matters in this case (Transcript of Proceedings, 154-155).

After he went to Lexington, Kentucky for a few weeks, for a cure for his addiction, he came back to Chicago and spoke with Spurlark. He stated he wanted to go back in business, but Spurlark said he could not help him. Three weeks later, Spurlark gave him a package of white powder which he tested and mixed. The price was $400 (A. 61). In June, 1958, he received another package from Gladys Davis for $500. On July 12, 1958, he sold a package to agent Bailey; and on July 17, 1958 sold more powder to agent Bailey, which he had received from Spurlark (A. 62).

On cross examination, the witness testified he used narcotics up to November, 1961 (A. 63). (The instant trial occurred February, 1962). When he was released from Lexington in March, 1958, and wanted to go back into the traffic, "In my mind this was a new venture for me." (A. 67).

Narcotic agent James Bailey testified he purchased some narcotics from Noble Thigpen through Larry Brooks in July, 1958. The envelopes purchased by Bailey, exhibits 20, 21, 33-A and B and 34-B and C were admitted into evidence over the objections of Green's counsel who explained that there was no connection between Green and the entire transaction (A. 85). The court admitted the evidence without any limitation (A. 85).

Government witness Woodrow Wilson testified he met Katy B. Lewis and Spurlark in 1952. Katy introduced him to Spurlark. He bought some white powder for $400 and made several more purchases until the latter part of 1953 when he got "hot" and left Detroit for

Milwaukee. He sold narcotics in Milwaukee which he had obtained from Spurlark (A. 91). He went into the Army in April, 1955. Before he left Chicago in 1952, he knew a man by the name of "Big John" in the latter part of 1954 (A. 91). In September or October, 1954, Spurlark asked him why he wasn't buying as much stuff as he had been, and the witness told him that a fellow on 24th Street, Big John, had a connection of his own and that the stuff was better. Spurlark asked if the witness knew Big John's connection and he said he did not (A. 91). Spurlark said he saw some people and they wanted to bust Big John. He met Spurlark in Mr Gayles' house. A Mr. Bryson and a Mr. Sims were there, also. They discussed making a buy from Big John. Spurlark gave him $500 to make a buy from Big John. When he gave Big John the money the next day, he saw Bryson and Sims trailing Big John (A. 82-93). Later Big John give him a package of the white powder which he gave to Spurlark. This was in November, 1954 (A. 93).

The largest single purchase of white powder he ever made was a quarter of a kilo from Spurlark early in 1955 for which he paid $3,300. He went into the Army in April, 1955 (A. 94).

At the time he talked with Dennis Green, his relations with Spurlark had been severed for a period of a couple of months (A. 104). When he went to Green, he had ceased operations with Mr. Spurlark and had gone around looking for somebody else and selected Dennis Green because he had a falling out with Spurlark (A. 105).

Government witness Elaine Wilson testified she was the wife of Woodrow Wilson and that after her husband went to the Army she received brown envelopes with some white powder in it from Katy B. pursuant to an arrangement

she and her husband had with Spurlark, which envelopes she gave to Dorothy Johnson for $350. She paid Katy B. the sum of $280 for it. This arrangement went on every two weeks for about five months (A. 126-128).

In June, 1957, defendant Gayles represented her husband in a case in the federal court in St. Louis (A. 128).

(The testimony of narcotic agent Robert Taylor with respect to purchases of narcotics from the defendant Willard Jones in April, 1957. (A. 152-155) was not admitted as against the defendant Dennis Green (A. 155).

Narcotics agent Charles Voll testified he talked to Willard Jones in April, 1957, after Jones was arrested (A. 163). (Green's counsel objected, but the objection was overruled. A. 164) The agent discussed with Willard Jones his source of narcotics and Jones stated that they were Italians named Al and Joe. (Green's objection to strike the evidence was overruled, and defense motions for a mistrial were overruled. A. 166.)

Narcotics agent Attie testified to his search of the apartment of Jones' girlfriend after Jones' arrest (A. 167-168). (Green's objection to the testimony was overruled. A. 167.) Attie testified to finding narcotics in Jones' girlfriend's bedroom. (A. 168).

Government witness Minnett Malpohn testified she spoke to defendant Spurlark in December, 1957, in the neighborhood of 47th Street, gave him $100 and he gave her a package of white powder which she sold. In February, 1958, she received another package of white powder from Spurlark and sold it in July, 1958 to Lemuel Kemp for $200 (A. 197-198).

Narcotic agent Joseph Dino testified he set up Minnett Maljohn to sell a package to Kemp in Davenport, Iowa (A. 200-201). (Upon defense motion to strike the testi-

mony of agent Dino, the court instructed the jury that what occurred in Davenport, Iowa was not material to the conspiracy and that the only relevance it had was to identify the exhibit 19-32A, being a form 417 which Dino executed in relation to grains of white powder which he received from Kemp and turned over to the United States chemist.)

Government agent George Abraham testified that in February, 1953, special employee Paul Spencer met with one Raymond Daniels and were seen talking to defendant Spurlark. Later, Daniels and Spurlark were alone. They joined special employee Spencer, who left and then gave a package to the witness. The same thing was repeated on March 2 and 9, 1953. Government exhibits 1-10, 2-11, 3-12 were typed forms describing the transactions. The contents of the packages themselves were destroyed (A. 210). The exhibits were admitted over the objections of the defendant. (A. 214).

Government witness Moses Winston Mardis testified he was in the bail bond business in 1954 and 1955 and arranged for the bond of Charles Webb in October, 1954 and for the bond of Cornelius Mack. In May, 1955, he bonded out the defendants Percy Johnson and Floyd Williams, at the request of defendant attorney Gayles. After he bonded them out, the witness called Gayles and said that Johnson and Williams were cooperating with the government. He also spoke to Spurlark, who told the witness to bring Johnson and Williams to Gayles' office (A. 218-219), which he did.

Government witness William Rouzer testified he met defendant Spurlark in 1955 or 1956. He bought two ounces of cocaine from Spurlark for $500, and went to Detroit. He had several more transactions with Spurlark and then did not see Spurlark any more until about July, 1958. He saw defendant Spurlark and purchased ten ounces of heroin

and two ounces of cocaine. He saw Gladys White in Detroit, Michigan about twelve to fifteen days after that, and she said that Ted had sent her, so he gave her $700 (A. 301-305).

EVIDENCE FOR DEFENDANT DENNIS GREEN

Defendant Dennis Green testified he lived in Los Angeles, California with his four children, was thirty-two years of age and had never been convicted of any felony. He denied he had conversations with Woodrow Wilson relative to the purchase or sale of narcotics and denied that he had any conversation with Wilson telling him that he should see or talk to Harriet Doyle. He denied he ever talked to Woodrow Wilson in his life concerning the sale or purchase of narcotic drugs. He met Wilson in a gambling place where they argued about money and Wilson pulled a knife on him in 1955. He had no other transaction with Wilson (A. 386-387).

He knew Willard Evans since grammar school in 1940. He graduated from grammar school in 1942 and went to Crane Tech High School, after which he went to Herzl College. At no time did he ever sell, or transfer any narcotic drugs to Willard Evans, nor did he ever have a conversation with Willard Evans regarding the sale or transfer of narcotic drugs. Willard Evans never paid him any money for narcotic drugs, nor money for any protection or for any reason (A. 387-388).

He lived in California since 1957 (A. 388-389).

He owned a barbecue business in Los Angeles for about a year and a half. Before he moved to California, he was in the real estate business as a real estate broker (A. 389).

EVIDENCE ON BEHALF OF THE OTHER DEFENDANTS.

Defendant Edward R. Gayles testified he was a practicing attorney and was admitted in 1950. Prior to that he entered the Army as a private, was released as a lieutenant. He worked in the Post Office while going to law school. Then he worked for the Veterans Administration; then obtained a job as a narcotic agent with the United States Treasury Department. He worked there for two years from December, 1950 to December, 1952. He entered the private practice of law in December, 1952, and became an investigator with the Illinois Crime Prevention Bureau. He went into the law office of Attorney Joseph Clayton where other lawyers also had offices. He knew Winston Mardis as a bail bondsman. He had represented government witness Woodrow Wilson in a case against him. He never asked Wilson who "Big John" was, nor was Woodrow Wilson ever in his home in the presence of Spurlark, James Bryson or George Sims.

He knew government witness Willard Evans as a defendant in the Criminal Court Building in 1954. Mr. Clayton was Evans' attorney. He did not have Evans hide out from the police. He never told Willard Evans he wanted money to fix any case.

He never conspired with anyone to violate the narcotic laws, nor to violate any other law (A. 315-329).

A judge, a number of lawyers, and a number of professional people testified to the good reputation of Gayles (A. 347-354).

Lieutenant George Sims of the Chicago Police testified he was with the detective division of the Bureau of Narcotics from 1951 to 1959, that he knew Edward Gayles,

and that there was no meeting in Gayles' home in the presence of Spurlark and Woodrow Wilson where the name "Big John" came up.

A number of witnesses testified to the good reputation of the defendant Nathaniel Spurlark (A. 374-375).

Dr. Jerome Katz testified he was a psychiatrist and was familiar in his practice with the subject of narcotic addicts. He was present in the court room when government witness Willard Evans testified. The doctor testified it was extremely rare to "kick the (narcotic) habit cold turkey." (A. 378-382).

Narcotic agent Wayne Valentine testified on behalf of the defendant White that the testimony of government witness Willard Evans that he was in the grand jury room with Evans was not true (A. 385).

REBUTTAL FOR THE GOVERNMENT

Dr. David Looff testified he specialized in psychiatry, was connected with the United States Public Health Hospital at Lexington, Kentucky, and that in his opinion, thirty-five days in jail was a sufficient time for an addict to "kick the habit" (A. 391).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

AS THIS WAS A CLOSELY CONTESTED CASE ON THE FACTS, IT WAS ERROR FOR THE COURT TO PERMIT THE JURY TO CONSIDER THE GOVERNMENT WITNESSES NOBLE THIGPEN AND WILLARD EVANS AS ANY OTHER COMPETENT WITNESSES. NOTWITHSTANDING THEY BOTH ADMITTED TO BEING NARCOTIC ADDICTS FOR A GOOD MANY YEARS.

IT WAS NOT ONLY ERROR FOR THE COURT TO REFUSE TO INSTRUCT IN ANY MANNER THAT THE JURY SHOULD VIEW WITH CARE AND CAUTION AND EXTREME SUSPICION THE TESTIMONY OF A NARCOTIC ADDICT, BUT THE ERROR WAS COMPOUNDED WHEN THE COURT ADVISED THE JURY THAT "A WITNESS WAS PRESUMED TO SPEAK THE TRUTH."

CONSIDERING THE PREVALENCE OF NARCOTIC PROSECUTIONS BY USE OF INFORMANT ADDICTS, THEMSELVES AMENABLE TO THE PROSECUTION ARM, CERTIORARI SHOULD BE GRANTED IN ORDER THAT THIS COURT MAY GUIDE THE TRIAL COURTS ON HOW TO INSTRUCT JURIES IN THE CONSIDERATION OF THE TESTIMONY OF ADMITTED NARCOTIC ADDICTS. ALTHOUGH A NUMBER OF CIRCUITS HAVE SPOKEN AND A FEW OF THE STATE SUPREME COURTS YOUR HONORS HAVE NOT YET REVIEWED THE ISSUE.

Government witness Willard Evans gave damaging testimony against the defendant (A. 227-247). He admitted

to being a narcotic addict for about ten years (A. 245) but stated that he kicked the habit. Expert testimony was introduced on the part of the defense that such person as Evans, considering his history of addiction, could not have kicked the habit (A. 378-383). The government presented expert testimony somewhat contrary to the defense expert (A. 391-393). Noble Thigpen also admitted to being an addict (A. 53, 63).

The jury's evaluation of the credibility of Evans was certainly crucial as to Green. The memory and/or truthfulness of Evans was seriously impaired when the narcotic agent assisting the prosecution in the case testified that Evans' memory was wrong with respect to Evans' testimony that the agent, Valentine, was in the grand jury room at the time when Evans gave testimony (A. 263-264). Motions for dismissal of the indictment were made on the ground that the secrecy of the grand jury proceedings were violated, which motions were based upon Evans' testimony that Valentine was present (A. 258, 261).

It was important then that the jury be instructed regarding the credibility of a witness who admitted to the use of narcotic drugs. Defense offered instructions on this point were refused (A. 442). It was proposed that the jury be instructed to the effect that:

> "You are instructed that in determining the credibility of a witness, you may consider his use of narcotic drugs or any impairment of testimonial powers arising from any source. The capacity of a witness to observe and receive accurate impressions, to retain them in his memory and to correctly relate them; also his power and inclination to be truthful are all subjects that go toward the credibility of a witness."

Additional offered defense instructions on this point which were refused follow:

> "Government witness Willard Evans has testified that he has been a narcotics user and addict for a period of about ten years prior to August 1961. His testimony should be received by the jury with extreme caution and suspicion. It is only when his testimony is corroborated by other credible evidence, and testimony that the jury should give serious consideration to the testimony." (A. 443).
>
> "The Court instructs the jury that the testimony of an admitted narcotic addict should be received by the jury with great caution and suspicion as such evidence is subject to imperfection, deceit and mistakes." (A. 443).

And,

> "The Court instructs the jury that where the evidence shows that a witness is a narcotic addict, that fact has an important bearing upon the credibility of such a witness. Although it does not follow that the testimony of such a witness must be disbelieved, the fact of his addiction is a fact on which the jury must take into account in weighing his testimony." (A. 444).

It was up to the jury to determine whether or not Evans was addicted to the use of drugs and to what the conflicting expert testimony of Dr. Katz (for the defense, A. 378-383) and Dr. Looff (for the prosecution, A. 391-393) determined.

In *Fletcher* v. *United States*, D.C. Cir., 158 F. 2d 321, a conviction was reversed where the government used a paid informer who was a narcotic addict to make a sale; and a sale to the informer was allegedly made by the defendant. The trial court in *Fletcher* refused an instruc-

tion similar to that offered here. The Appellate Court stated, p. 322:

> "Granting that the credibility of the testimony of a paid informer is for the jury to decide, it nevertheless follows that where the entire case depends upon his testimony, the jury should be instructed to scrutinize it closely, for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness' own interest. . . . And when to this is added *the well recognized fact that a drug addict is inherently a perjurer where his own interests are concerned, it is manifest either that some corroboration of his testimony should be required, or at least that it should be received with suspicion and acted upon with caution.* . . . The duty is more impelling where, as here, there is not a jot or tittle of other evidence and a criminal record of the witness is shown." (Emphasis added).

To similar effect see *People* v. *Crump*, 5 Ill. 2d 251, 261; *State* v. *Prentice*, 192 Ia. 207, 183 N.W. 411; and 52 ALR 2d 834.

In *State* v. *Fong Loon*, 29 Idaho 248, 158 P. 233, 236, the court stated,

> ". . . habitual users of opium, or other like narcotics, become notorious liars . . . 'the chronic morphinomaniac is often a confirmed liar. The truth is not in him.' . . . The capacity of a witness to observe and to receive accurate impressions, to retain them in his memory, and to correctly relate them, also his power and inclination to be truthful, are all subjects which go to the credibility of a witness."

There is little protection for an individual accused by an informer who has his own purposes and his own interests at stake. It is most difficult to defend an accusa

tion of sale of narcotics where there is not official surveillance or some corroboration. Accordingly, the reviewing courts view with great suspicion convictions based on uncorroborated testimony of government informers with respect to accusations of narcotic violations.

The Supreme Court of Illinois recently reversed a conviction by a judge on a bench trial based on informer's testimony where there was no substantiation of the informer, either by way of police surveillance or narcotics being found on the defendant or marked money being found on his person. *People* v. *Bazemore*, 25 Ill. 2d 74, 182 N.E. 2d 649 (1962). The court said:

> "Where, as here, the state's case rests solely upon the credibility of an admitted narcotics addict, a trial court, and in the final analysis this court, must carefully and closely scrutinize the testimony of the witness . . . although it does not necessarily follow that his testimony must be disbelieved. . . . *The fact that a witness is a narcotics addict has an important bearing on his credibility.*
>
> "This is not a case where the informer's accusation receives corroboration from close police surveillance of the transaction, from an immediate arrest, or from the finding of marked money on the accused, *but one which developed in such a way that the informer was at liberty to name almost any person he wished to select as the guilty one.*" (Emphasis added).

If a trial court hearing the case without a jury must take into consideration that a prosecution witness' *addiction to narcotics* bears upon his credibility, how much more important it is that a jury be instructed as to the manner of evaluation of such person's testimony.

In addition to refusing to give proper instructions on this point, the court erroneously instructed the jury on how to evaluate the credibility of a witness.

This was a close case, in which the allegations on the part of the government witnesses were denied by the defendants, and in particular by defendant Green. The issue of the credibility of Evans and Wilson on the one hand, and that of Green on the other, was entirely for the jury to decide under a set of proper instructions. The court erroneously instructed the jury as follows:

> "A witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence."
>
> • • •
>
> "If you find the presumption of truthfulness to be outweighed as to any witness, then you will give the testimony of that witness such credibility, if any, and such weight, if any, as you think it deserves." (A. 420).

The vice of that erroneous instruction was discussed in the recent case of *Knapp* v. *United States*, 5 Cir. 316 F. 2d 794 (1963). Circuit Judge John R. Brown, with respect to the court's discussion of the exact charge here given, stated:

> "These charges are not only deficient from a structural standpoint, I think they are positively wrong." (p. 795)

And further (p. 796):

> "Considering the charge as a whole, which the law exacts of appellate courts and theoretically of juries, it lays down the proposition that as a matter of law, and not as a mere matter of inferences or impressions drawn, a witness speaks the truth unless there is 'convincing evidence', to the contrary. . . ."

"Recasting the instructions on the credibility of a witness, the shorthand symbol 'presumed' or 'presumption' would make them read substantially as follows:

> 'The law requires that the jury conclude that a witness speaks the truth. . . .'

"This is more than mere confusion engendered by the loose, inarticulate use of the ambiguous word 'presumption' or 'presumed' which this Court pointed out in *Barfield* v. *United States*, 5 Cir., 1956, 229 F. 2d 936 at 939-941. Here 'presumption' becomes a mandate of law.

"Of course once it becomes a mandate, it is positively wrong. This is so because the truth finding function of a jury in determining the credibility of a particular witness is not a matter which can be committed to a verbalized formula by a Judge or a number of Judges or a Court or a number of Courts. Nor is the matter saved by such weasel-phrases such as 'in the absence of convincing evidence to the contrary,' 'until outweighed by evidence to the contrary,' etc.

"What is truth relates to facts, not legal principles. *Who* is telling the truth is not a legal question. *How* the truth is determined is not a legal matter. This is a thing committed to the common sense and good judgment of the jurors based on everyday experiences as human beings in an imperfect society. A moment's reflection will remind even Judges that in the quest for truth in their affairs off the bench they believe, they disbelieve, they accept, or they reject the statements of their fellow men in countless situations most frequently by intuitive judgment or impression wholly incapable of an articulate elucidation. The genius of the jury system is to transport this common sense into the machinery of the law. If the law undertakes to prescribe categorically either *what* is truth, or *who* is truthful, or *how* one goes

about ascertaining *who* or *what* is truthful, the verdict becomes something less than the reflection of this process of good common sense. (Emphasis, the court's.)

The 7th Circuit here held that *Fletcher* v. *United States*, 158 F.2d 321, D.C. Cir. and *People* v. *Bazemore*, 25 Ill. 2d 74, did not apply (Opinion, Appendix "A", p. 8). But, the government's case against petitioner largely depended upon the government witness Willard Evans who admitted to being a narcotic addict for ten years (A. 245). Government witness Thigpen also admitted to being a narcotic addict (A. 53, 63). Petitioner Green testified fully and subjected himself to cross examination. He was a person never before arrested, married, with a family, and who had legitimate businesses (A. 386-389).

It was most incumbent, then, for the jury to receive careful instructions with respect to the evaluation of the testimony of government witnesses Evans and Thigpen, as against the testimony of defendant Green. It is to be remembered that this was not an overwhelming case against Green, but rather a close one in which there was no corroboration by any "legitimate" government witness of the story of the witness Evans. Under the circumstances then, it was reversible error not to instruct as requested (A. 442; 443 and 444).

This Court, stated, *On Lee* v. *United States*, 343 U.S. 747, 757, that:

> "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination *and to have the issues submitted to the jury with careful instructions.*" (Emphasis added.)

Just as it is essential to a fair trial that the court allow cross examination as widely as the rules of evidence permit where the principal witnesses for the government have criminal records or have engaged in illegal practices, *United States* v. *Masino*, 2 Cir. 275 F.2d 129, it is essential to a fair trial that proper instructions be given to the jury on these types of witnesses.

The trial court failed to give *any* of the requested instructions with respect to the evaluation by the jury of the testimony of a witness who was an admitted narcotic user. The Appeals Court holding that the court's instruction to the jury to give careful scrutiny to the testimony of each witness and to observe his demeanor on the witness stand was proper fails far short of the requested instructions under the circumstances. It has decided this federal question in a manner in conflict with the District of Columbia Circuit (cf. *Fletcher* v. *United States*, 158 F.2d 321).

We submit your Honors should grant certiorari to advise the various circuits and the district judges whether Judge Brown's criticism of an instruction that, "A witness is presumed to speak the truth" is valid criticism.

It is apparent that trial judges are advising juries that "A witness is presumed to speak the truth" because such instruction is included in a list of suggested jury instructions compiled by Judge Mathes of the Southern District of California. See 27 FRD 67.

The Seventh Circuit agrees that such instruction is proper. The Fifth Circuit disagrees and criticizes the instruction. *Knapp* v. *United States*, 316 F.2d 794 (1963). Your Honors should decide, amongst other matters, which Circuit is correct.

II.

WAS IT NOT FURTHER ERROR TO REFUSE TO INSTRUCT THAT THE TESTIMONY OF GOVERNMENT WITNESSES WHO ADMITTED THEIR PARTICIPATION IN CRIME SHOULD BE RECEIVED WITH SUSPICION AND ACTED UPON WITH CARE AND CAUTION?

This Court has announced that the theory of trials in this country depends upon the jury's evaluating the evidence in accordance with appropriate guiding instructions by the court. *Opper* v. *United States*, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

Considering the direct disputation of the evidence between the government witnesses Evans and Wilson and the petitioner, it was incumbent upon the court to instruct the jury that the testimony of witnesses Evans and Wilson should have been scrutinized with care and caution and received with suspicion.

The petitioner avoided offering an "accomplice" instruction for the reason that an accomplice is one who unites with another in the commission of a crime. *Caminetti* v. *United States*, 242 U.S. 470. For it was the theory of the defense that no crime at all was committed between the witnesses and the petitioner. Accordingly, petitioner offered his instruction as follows (A. 442):

> "You should scrutinize very carefully the testimony of any witness who has turned 'government witness'

> insofar as to incriminate himself, or with others in the offense charged. That evidence is not to be taken as that of an ordinary witness of good character. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses."

The court refused to give this instruction; and gave no other instruction affective of the consideration which the jury should give these kind of "government witnesses". The court did give an instruction as follows (A. 420-421):

> "In this connection if you find from the evidence that any witness for the prosecution has been promised immunity or has received immunity from the prosecution, or reward for any testimony given by him in this case, or anticipated or hoped for, or expected immunity or some other reward, or advantage as a result of, or dependent upon his testimony, then you are entitled to consider that fact or those facts in weighing his credibility as truthfulness as a witness."

But such instruction falls far short, and is different from, the instruction which petitioner requested and which was pertinent to the situation in the case.

This question was raisgd on review, but the Court of Appeals failed to render its opinion in this matter. It merely stated that it saw no need of discussing the claimed error on this instruction (Opinion, Appendix A pp. 8-9).

It may be that the Court of Appeals would not have been able to meet its own opinion in *United States* v. *Balodimas*, 7 Cir. 177 F.2d 485, 487 wherein the court agreed that to call a government witness "an accomplice" would be to affect the minds of the jury in deciding the issue before it. "If the jury accepted the court's theory

that these witnesses were accomplices and had openly admitted that they were law violators and that they had a part in the commission of the crime, it is difficult to discern how they could have avoided the conclusion that error on this instruction (Opinion, Appendix A, p. App. 1). the defendant was also guilty." (p. 487).

It was for that precise reason the petitioner offered the instruction he did (A. 442).

This Court has not spoken in connection with the manner by which the trial courts should instruct regarding the testimony of witnesses who incriminate themselves with others, but whom defendants object to being called accomplices.

III.

EVEN IN A CONSPIRACY CASE THE GUILT OF A DEFENDANT IS INDIVIDUAL. IT WAS ERROR FOR THE COURT TO INSTRUCT THE JURY THAT IT MAY FIND THE PETITIONER GUILTY EVEN IF HE DID NOT HAVE KNOWLEDGE OF THE DETAILS OR MEANS BY WHICH THE OBJECT OF THE CONSPIRACY WAS TO BE ACCOMPLISHED.

The permissive presumption feature of Section 174, Title 21, U. S. Code was improperly abetted by the court's equivocal and erroneous instruction on this essential element of the crime.

Instructions of the court must not be equivocal. *Bollenbach* v. *United States*, 326 U.S. 607, 613; and the issues must be submitted to the jury with careful instructions. *On Lee* v. *United States*, 343 U.S. 747, 757.

The statute under which defendant was found guilty is Section 174, Title 21, U. S. Code. In pertinent part it is as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or

any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. ... .

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The object of the conspiracy, then, is the unlawful importation into this country of the narcotics, knowing the same to have been imported illegally.

Possession of the narcotics, or aiding or abetting in the possession thereof, by itself, is no federal offense. *United States* v. *Landry*, 7 Cir., 257 F.2d 425, 431. In a conspiracy to possess, the knowledge that the heroin was imported illegally into the United States is the essential element. The jury may infer from the fact of possession that a defendant knew of the illegality of its importation. The presumption allowed by the statute is simply an evidentiary aid to the government, and does not conclusively foreclose the question. It is required of the government to prove all essential elements of the offense, *including* the knowledge that the narcotics was imported illegally into the country. Yet, the court erroneously suggested, in its general discussion of the law of conspiracy, that knowledge of importation was not necessary. The court advised the jury that the defendants:

> "... do not need to know all the details nor all of the means by which the objectives of the conspiracy are to be accomplished." (*X*. 428)

This is the very instruction in a similar charge of conspiracy to violate Section 174, Title 21, upon which the Second Circuit based its reversal of the convictions in *United States* v. *Massiah*, 307 F.2d 62, 70 (1962). There, the Court stated that the trial judge incorrectly suggested to the jury that knowledge of importation was not necessary when the jury was instructed that:

> "One may become a member of a conspiracy *without full knowledge of all the details of the conspiracy or of all the conspirators.*" (Emphasis, the Court's.)

The Court held it to be "plain error" under Rule 52(b) requiring reversal even if the point was not raised below, because, as the Court said:

> "In a criminal case, the defendant is entitled to have the jury instructed on all the elements that must be proved to establish the crime charged." (p. 71).

The error in the court's charge here is that it rejected the idea that the jury must find that the drugs were imported to the knowledge of each defendant in violation of the law. The government relied upon, and the court adopted, the presumption theory in Section 174 of Title 21. There was no proof in the entire record that Green actually knew that any heroin, or any narcotic, was imported illegally into the United States, as was required of the government to prove before conviction could be had.

In *Massiah* the court reversed, "although there concededly was sufficient evidence in this case from which the jury could find or presume knowledge of illegal importation, this provides no ground for assuming that it would have done so had the issue been presented to it." (p. 71).

The only comment the 7th Circuit Court of Appeals made was to state that the instruction of the trial court

was not error. (Opinion, Appendix A, pp. 8-9). The court did not discuss the claimed error, nor render its opinion in any manner.

The holding in *United States* v. *Massiah*, *supra*, is in conflict with the instant holding of the Seventh Circuit that the instruction was proper.

Certiorari should be granted to resolve this issue, arising as it does so often, considering the frequency of narcotic conspiracy prosecutions in the federal courts.

IV.

IT SHOULD BE DETERMINED WHETHER THE RULE IN KOTTEAKOS V. UNITED STATES, 328 U.S. 750, APPLIES IN NARCOTIC CONSPIRACY CASES.

IF THE RULE APPLIES, THE CONVICTION SHOULD BE REVERSED FOR THE REASON THAT, GRANTING EVERYTHING THE GOVERNMENT SAYS TO BE TRUE, THERE WERE SEPARATE AND DISTINCT CONSPIRACIES AMONG THE MISJOINED DEFENDANTS.

The evidence was set out at length under the statement of facts in order to demonstrate that if the government proved anything at all, it proved the several defendants were engaged in separate conspiracies, and not one joint conspiracy.

In order to demonstrate that the government's case, taken at face value, involved separate conspiracies we must demonstrate sequence by sequence, and fact by fact, that the evidentiary situation developed separate conspiracies, and not a joint one.

(Compare the detailed exposition of the evidence as requisite for a proper consideration of the case in *United States* v. *Bentvena; et al.*, 319 F.2d 916, 2 Cir. 1963).

Government witness Nobel Thigpen did not mention any defendant except Theodore Spurlark and Willard Jones (A. 53-62). He bought narcotics from Katy B. Lewis from 1951 to 1956, because defendant Spurlark told him to go to Katy's house in 1951. When Katy died in 1956, Spurlark sent him to defendant Willard Jones, who sold the witness narcotics a couple of times, according to the testimony. He went to Lexington, Kentucky for a cure and then returned and spoke to Spurlark from whom he bought white powder a couple of times. He further testified that in July, 1958, he sold some stuff to narcotic agent James Bailey which he had obtained from Spurlark.

He also hired defendant Gayle, who was an attorney, in April, 1953, for a narcotics case (A. 61).

No mention by Thigpen of Green, Faulkner or Davis.

When agent James Bailey testified that he bought narcotics from government witness Thigpen through one Larry Brooks in July, 1958, defendant Green objected on the ground that no connection was shown with Green (A. 85). The objection was overruled.

Government witness Woodrow Wilson testified he had transactions with defendant Spurlark from 1952 until he went into the Army in April, 1955. No mention of Green, Faulkner, Davis or Jones during this period of his testimony (A. 89-94). When he left the Army in October, 1955, he met Green a couple of months after that. He told Green that Spurlark was sore at him because he had made "buys" in New York (A. 95). According to the witness, Green told him to go to Harriet Doyle as ". . . my stuff would look better than Ted's (Spurlark) because he cuts his a little more than I do." (A. 95). He then saw Harriet Doyle and had two transactions with her for $400 an ounce (A. 95-96).

Later, he purchased from Spurlark again, and when Katy B. died, he purchased from Willard Jones, whom he met through Spurlark, until June, 1957 (A. 96).

Not only was there no showing that Green and Spurlark were in a conspiracy to sell narcotics to Wilson, but the contrary was shown. Wilson testified that he selected Green because he had a falling out with Spurlark, that he had ceased operations with Spurlark, and had gone around looking for somebody else (A. 105). He had discontinued having anything further to do with Spurlark for two or three months and that is the time that he went and talked to Dennis Green. "My relations with Spurlark had been severed for a period of a couple of months at this time." (A. 104).

Elaine Wilson, the wife of Woodrow Wilson testified she bought narcotics from Katy B. after an arrangement with Spurlark after Wilson left for the Army (A. 126-129). There was no connection shown between this testimony and any of the other defendants.

Narcotics agent Robert Taylor testified he bought some narcotics from defendant Willard Jones in April, 1957 (A. 152-156). No other defendant was mentioned by Taylor; and as a matter of fact, conversations between agents Taylor and Voll, and defendant Jones, were not admitted as against the defendant Green (A. 155). However, the court allowed the "acts" between the parties to be considered by the jury (A. 163).

So far removed was some of the evidence introduced by the government from anything charged in the indictment, that testimony by narcotic agent James Attie, that after Willard Jones was arrested he searched Jones' girl friend's apartment and found narcotics was admitted into evidence over objections (A. 167-176).

A totally irrelevant transaction (as to Green) between government witness Minnett Maljohn and Spurlark in July, 1958 was introduced (A. 197-199) for the purpose of getting into evidence testimony that Maljohn sold a quantity of powder to one Lemuel Kemp in Davenport, Iowa (A. 200-205). *This was in July, 1958 after Dennis Green had left to reside in California in 1957* (A. 389).

Narcotic agent George Abraham testified that in February and March, 1953, a special employee, Paul Spencer and a Raymond Daniels bought narcotics on three occasions from Spurlark (A. 206-213).

Government witness Willard Evans testified that he bought narcotics from defendant Green from 1952 to 1954. Then he stopped buying for a while from Green and started again after that (A. 227 to 239). In May, 1954, Moses Mardis introduced Evans to Spurlark and Spurlark told the witness that his stuff was better than the stuff the witness was getting from Green (A. 230). So he started to buy from Spurlark through Katy B. Lewis. In November and December, 1955, the witness testified he became partners with defendant Faulkner and that he and Faulkner bought some narcotics from Green for $6,000. In April, 1956, he again bought some white powder from Green after he had a split with Faulkner (A. 235).

Evans also testified that some time early in 1955, in Moses Mardis' house, Green, Mardis, Spurlark and one Jimmy White were present and then were talking about Dennis taking over the sale of narcotics on the west side (A. 232). (It is interesting to note here that when the government presented Moses Mardis as a witness (A. 217-220), he gave no such testimony of a meeting in his house as testified to by Willard Evans.)

From all that appears in the testimony, believing the government witnesses, Spurlark and Green were competitors. Spurlark never had any transactions or dealings with defendant Faulkner, according to the evidence.

Defendant Gayles is never shown to have engaged in any narcotics transaction. The worst interpretation that can be placed upon defendant Gayles' activities, according to the testimony of the government witnesses, is that he, as an attorney, represented some of the government witnesses in court. He represented government witness Woodrow Wilson in St. Louis in 1957, when Wilson entered a plea of guilty and received a sentence of five years (A. 128). He represented the government witness Noble Thigpen in April, 1953, in which case Thigpen was discharged (A. 61). Gayles also represented Willard Evans in 1957 on some State charge (A. 245), according to Evans; but this was denied by Gayles.

Whatever was proved against Gayles, certainly there was no *conspiracy* between Gayles and Green, or any other defendant, *to import narcotic drugs or to facilitate its transportation.*

The facts here are similar to those in *Kotteakos v. United States*, 328 U.S. 750, where this Court held the government proved not one conspiracy, but eight or more different ones of the same sort (p. 752). Your Honors stated, (p. 755):

> "The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment. (citing cases). The Court of Appeals aptly drew analogy in the comment, 'thieves who dispose of their loot to a single receiver—a single "fence"—do not by that fact alone become confederates. They may, but it takes more than knowledge that he is a "fence" to make them such.' 151 F. 2d at 173."

And further, p. 764:

> "In criminal cases the outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen and the question is, not were they right in their judgment regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."

The facts in this case are remarkably similar to the facts in *United States* v. *Russano*, 2 Cir., 257 F. 2d 712, where the court reversed a conviction for conspiracy to traffic in narcotics where the evidence established two separate conspiracies. There, the same appellants engaged in certain dealings in narcotics in 1952, and then, after a lapse engaged again in dealings in narcotics in 1955 and 1956. The government charged a continuing conspiracy from 1951 to 1957. Even though the court assumed that the properly admitted evidence at the trial would suffice to establish an offense of conspiracy in 1952 and the separate offense of conspiracy in the years 1955-1956, the court reversed for the reason that evidence regarding the appellants' activities in the latter years should not have been introduced as affecting the consideration of their activities in 1952; and accordingly, the court reversed and remanded.

The reverse of the situation occurred in *United States* v. *Aviles*, 2 Cir., 274 F. 2d 179, where three of fourteen defendants in a narcotics conspiracy trial held under Section 174, Title 21, U. S. C., complained that they could not be convicted because of double jeopardy, in that they had already been convicted for the same acts. (See *United States* v. *Stromberg*, 2 Cir., 268 F.2d 206.) In *Aviles*, the Court held (p. 194) the fact that some defendants in a

prosecution for conspiracy to violate narcotic laws had as dealers been convicted for purchasing narcotics from a particular party and after that party's arrest, then turned to other defendants for their supply, did not transform the two separate conspiracies into one, and they were not entitled to an acquittal on the ground that they were twice placed in jeopardy.

If, then, to convict, the court held that separate transactions such as those testified to in the instant case were separate conspiracies for which separate indictments and separate convictions and punishments thereon were proper, should not the 7th Circuit similarly have held that separate conspiracies are involved, and accordingly reverse? See *United States* v. *Bentvena, et al.*, 2 Cir., 319 F. 2d 916 at 945 (1963).

CONCLUSION

The conspiratorial device theory as now presented by the federal prosecutors give ample proof to the warning of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440, p. 445-6, "The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

He concluded, p. 458, "The most odious of all oppressions are those which mask as justice."

We pray your Honors will consider this a fit case to grant its writ of certiorari.

Respectfully submitted,

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APPENDIX "A".

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 13849-13853

SEPTEMBER TERM, 1963. JANUARY SESSION, 1964.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13849 v.
DENNIS GREEN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13850 v.
GLADYS DAVIS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13851 v.
ARTHUR FAULKNER, JR.,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13852 v.
EDWARD R. GAYLES,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13853 v.
NATHANIEL SPEARS,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

February 12, 1964.

Before HASTINGS, *Chief Judge*, KNOCH and KILEY, *Circuit Judges*.

KILEY, *Circuit Judge*. Appellants appeal from their conviction, by a jury, after a thirteen day trial on an indictment charging a conspiracy to violate the narcotics law.[1] The five appeals were consolidated in this court.

In deciding the issue whether there was evidence upon which the jury could infer guilt of defendants beyond a reasonable doubt, we must take the testimony and reasonable inferences most favorable to the government. *United States* v. *Glasser*, 315 U.S. 60, 80 (1942); *United States* v. *Mucle*, F. 2d (7th Cir. Nos. 14145-49, January , 1964).

Thigpen,[2] at defendant Spurlark's direction, purchased narcotics from Katy Lewis from 1951 through 1956. After her death in 1956 Spurlark directed Thigpen to purchase from defendant Willard Jones.[3] In 1958 Spurlark directed him to pick up narcotics from defendant Gladys Davis. In 1958 Thigpen twice sold narcotics received from Spurlark to Narcotics Agent Bailey. From 1952 to 1955 witness[4] Wilson purchased narcotics from Spurlark and Lewis. He also arranged for his wife to purchase from them. Later Wilson bought narcotics from defendant Green and Green told him "you kno[w] Ted [Spurlark] and I are in business together * * * my partner." Witness William Smith purchased narcotics from Spurlark in 1953 and 1954 and thereafter from Katy Lewis until her death. After her death, Smith, at Spurlark's direction, bought narcotics

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[1] A conspiracy in violation of 21 U.S.C. § 174.

[2] An unindicted co-conspirator.

[3] Appellant in No. 13854, not consolidated with these cases.

[4] "Witness," as used in this opinion, designates those who are neither defendants nor unindicted co-conspirators and who testified at the trial.

from Jones and then from Gladys Davis. From 1952 to 1954 Evans bought narcotics from Green, and later from Spurlark and Katy Lewis. In 1955 Spurlark told witness Mardis that he was putting Green "in charge of all activity on the west side."

In 1955, at a conversation at which Evans, Green, Spurlark and Mardis were present, Evans was told Green was to take over the sale of narcotics on the west side. Late in 1955, with Green's permission, Evans and defendant Faulkner "combined" their business for the sale of narcotics on the west side for a few months. In June of 1956 Faulkner and Spurlark brought narcotics back from New York to relieve a "shortage" in Chicago. Evans purchased narcotics from Green from 1953 to 1959 except for a two month period when, in Green's absence, he bought from Faulkner.

Witness Rouzer of Detroit made several purchases from Spurlark in 1955. In 1958, at Spurlark's direction, Rouzer twice went to Gladys Davis' apartment to await narcotics deliveries. And twice Spurlark sent Gladys Davis to Detroit to get money from Rouzer for Spurlark.

It is needless to detail more of the testimony which amply justified the jury in the inference that at the center of this narcotics web was Spurlark, holding it together, and operating from the Rogue Lounge on Chicago's south side, through Dennis Green, Evans and Faulkner on the west side, and through the late Katy Lewis, Jones and Gladys Davis on the south side.

The testimony against defendant Gayles, an attorney, did not link him in any way with the sale or distribution of the narcotics. There is testimony favorable to the prosecution, however, and the inferences the jury could reasonably draw,

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An unlawful conspiracy

to show that he was more than as attorney for the defendants; and that he knowingly participated intentionally, *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943), in aiding his co-defendants, and others, from late 1954 to 1959, in carrying out their illegal enterprise. "After 1953" he was a manager, along with defendant Green, in the Morticians Underwriters Association, in which Spurlark and Faulkner had made investments. Gayles was present at the meeting and conversations in his home attended by Spurlark, Wilson, and police officers who were planning the arrest of "Big John," a competitor of Spurlark's whom the latter said "some people" wanted to "bust." Gayles told Thigpen, an addict and peddler whom he represented, that for $125 per month he could see that the police did not bother Thigpen again. Gayles told Wilson to be careful about telephones and tape recorders, and to use gloves when handling packages because the police "will be trying to get" him. Gayles told Evans and Faulkner to stay away "from around the Setup" tavern because police officers were looking for them. He told Evans that he would need "five hundred" to fix a case, after confirming that Green would vouch for the money.[*]

There is no merit to the contention of defendants that more than one conspiracy was shown, to their prejudice, by the evidence, or that the evidence showed merely a number of unrelated episodes. There is testimony to show that Spurlark, beginning in 1952, was the source from which the narcotics flowed to his south and west side minions; and that Gladys Davis, Evans and Faulkner operated to

[*] For example, the sale by Spurlark to witness Minnett Maljohn in 1958, who took the purchased goods to Davenport, Iowa, established that the "white powder" Spurlark was selling was heroin hydrochloride.

some extent on both the south and west sides of the distribution structure. The jury could infer from this evidence that each defendant knew, or should have known, of the conspiracy. *United States* v. *Poliafico*, 237 F. 2d 97 (6th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957). It was not necessary that each co-conspirator knew all others or that each witness mention all, or that each one be involved throughout the entire span of seven years. *United States* v. *Miceli*, __ F. 2d __ (7th Cir. Nos. 14145-49, January 8, 1964). A fluctuation of the membership during the span of this record of continuous activity cannot be compared to the facts in *United States* v. *Russano*, 257 F. 2d 712 (2d Cir. 1958), where the evidence established two conspiracies with a break between the two. The rule in *Kottcakos* v. *United States*, 328 U.S. 750 (1946), is not applicable here, because the evidence shows but one conspiracy with Spurlark at the center and several conspirators radiating from him. The trial court properly denied motions for severance on grounds of variance or misjoinder.

Since the cases of Johnson and Williams were severed during trial, there is no merit to Gayles' contention of prejudicial joinder. The court, in ruling against Gayles' proffer of testimony of his pre-conspiracy participation in arrests of co-defendants, weighed the probable prejudice to Spurlark and Green against the probable gain to Gayles from the testimony. We see no abuse of discretion in the ruling, and cannot see error in denying him a severance because he could not, otherwise, introduce the testimony.

Gayles proffered an instruction which told the jury that Gayles' representation of co-defendants for narcotics violations was insufficient to prove his participation or membership in the conspiracy. It then went on to state, in the

abstract, rights and duties of attorney[7] in defense of alleged violations of law. The trial court read this instruction as tending to direct a verdict of not guilty, and added the following cautionary paragraph:

> "You are not to infer from the foregoing however, that an attorney has any special status which permits him to perform an unlawful act, or to join an unlawful conspiracy, nor may he knowingly assist a client to commit an unlawful act or to further an unlawful conspiracy."

We cannot say the court misread the proffered instruction, nor that the modification directed a guilty verdict or otherwise prejudiced Gayles, nor that the paragraph was without an evidentiary basis.

Gayles tendered an instruction dealing generally with jury's consideration of the use of narcotics as an element in determining credibility. Faulkner offered an instruction naming government witness Evans as a ten-year addict prior to August, 1961, and stating his testimony should be received with "extreme caution and suspicion" and be given serious consideration only when corroborated. The court refused to give these instructions.

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[7] "It is the right and duty of a lawyer to undertake the defense of a person accused of a crime, regardless of his personal opinion of the guilt of the accused. Otherwise, innocent persons, victims only of suspicious circumstances may be denied proper defense.

"Having undertaken such defense the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the ends that no person may be deprived of life or liberty, except by due process of the law.

"Under the law an attorney may not reveal or disclose to law enforcement agencies or to anyone, any information revealed to him by his client. And the fact that an attorney does not inform or advise law enforcement agencies of any information revealed to him by a client is not in any way to be taken or construed against said attorney."

The court gave thorough instructions regarding credibility and weight of testimony, beginning:

> "You have heard much discussion of the question of the credibility and weight you are to give to the testimony of the particular witnesses. Let me be as explicit as I can on that."

The instruction went on to inform the jury that they were "sole judges" of credibility; that the presumption that a witness speaks the truth is rebuttable by the manner in which he testifies, the character of his testimony, or contradictory evidence; that in weighing the testimony of each witness they were to give *careful scrutiny* (our emphasis) to the circumstances of his testimony, his demeanor on the stand, his relation to the government or to defendants, the manner in which the verdict might affect him, and the extent to which he is contradicted; and that they could consider promises of immunity or hope of reward in weighing the credibility of the witness, and the effect of any false testimony they might find on other testimony of the witness. The instruction told the jury of its right to examine the evidence "closely and carefully in the light of the common knowledge and experience of mankind * * * and your own" in determining credibility.

The court was clearly correct in rejecting Faulkner's instruction naming witness Evans. And in different words the substance of Gayles' instruction was covered.

Defendants admit that Evans' history as an addict was brought out "with commendable candor" by the government and there is no complaint that cross examination of him was unduly limited. Defendants' expert witness' opinion was that Evans testified "to the best of what would be his normal ability," and government's expert's testimony would justify the inference that Evans had "kicked the habit" several months prior to testifying.

Fletcher v. *United States*, 158 F. 2d 321 (D.C. Cir. 1946), is distinguishable because the district court there refused to instruct the jury that the informer's testimony should receive greater scrutiny and care than the ordinary witness. The court of appeals limited the decision to the "facts of this case" where the testimony of the informer, addict and dope peddler, was uncorroborated and the only testimony against Fletcher. And *People* v. *Bazemore*, 25 Ill. 2d 74, 182 N.E. 2d 649 (1962), is to the same effect. The inference here could be that Evans was not an addict, that his testimony had been corroborated and that the instruction was sufficiently cautionary. The dictum in *Fletcher* about "the well recognized fact" of an addict being "inherently a perjurer" is not pertinent. Here, under the instruction the jury knew Evans' testimony should be carefully scrutinized. The circumstances here do not fall under the reversible error test laid down by the court in *Phelps* v. *United States*, 252 F. 2d 49, 53 (5th Cir. 1958).

We see no merit in the contention that the district court committed reversible error by refusing to give the instructions tendered by Gayles and Faulkner.

The court's instruction is criticized too for stating that "a witness is presumed to tell the truth . . ." and we are referred to Judge Brown's concurring opinion in *Knapp* v. *United States*, 316 F. 2d 794 (5th Cir. 1963), where the only witnesses were government witnesses. The majority did not reverse; it did not approve the instruction on the facts there. What Judge Brown said, with no idea of reversible error, of the "presumed to tell the truth" statement was said in relation to an accompanying instruction and we think does not relate to the instruction here.

We see no need of discussing other claims of error in the giving or refusing of other instructions. We have con-

sidered the claims and find that the court's instructions included in substance all proffered instructions that were proper and that the instructions given were not erroneous.

The rule in *Falcone v. United States*, 109 F. 2d 579 (2d Cir. 1940), *affirmed* 311 U.S. 205, does not apply to render reversible error the testimony of Wilson regarding Gayles and Spurlark and testimony of Mardis as bondsman. Neither does the hearsay rule exception discussed in *Krulewitch v. United States*, 336 U.S. 440 (1949), nor the rule in *Greenwood v. United States*, 353 U.S. 391, 401-04 (1957), apply to the testimony of Evans against Gayles. These items of evidence in the context of all the evidence, related above render the rules inapplicable: the jury could conclude the events testified to were in furtherance of the conspiracy, not merely legitimate transactions; and not a "subsidiary conspiracy" of events after the alleged conspiracy ended. And we see no error in the cross examination of Gayles about the Morticians Association and see no reversible error in the cross examination about his trips with other men and women not their wives.

In view of *United States v. Garfoli*, 324 F. 2d 909 (7th Cir. 1963), and because of what was sought, we see no abuse of discretion in the trial court's denial of Green's motion for a bill of particulars.

Various other alleged errors, asserted by the different defendants, have been considered, but we find them to be without substance. We find no reversible error as to any of the defendants.

The judgments are AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

Petition for Rehearing denied on March 9, 1964.

APPENDIX "C"

Section 174, Title 21, United States Code

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned . . . . .

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

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In the Supreme Court of the United States

October Term, 1952

No. 8

[illegible]

Petitioner,

v.

[illegible]

Respondent.

No. 9

[illegible]

Petitioner,

v.

[illegible]

Respondent.

No. 10

[illegible]

Petitioner,

v.

[illegible]

Respondent.

Motion for Leave to File Brief as Amicus Curiae and Brief for the United States

PHILIP B. PERLMAN,
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Assistant Attorney General,
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Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 973

EDWARD R. GAYLES, PETITIONER

v.

UNITED STATES OF AMERICA

No. 974

NATHANIEL SPURLARK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 975

DENNIS GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1288 Misc.

ARTHUR FAULKNER AND GLADYS DAVIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 327 F. 2d 715.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1964. Petitions for rehearing were denied on March 9, 1964. The petitions for writs of certiorari in Numbers 973, 974, and 975 were filed on April 7, 1964. As to Number 1288 Misc., Mr. Justice Brennan on March 16, 1964, extended the time for filing until April 11, 1964, on which day Mr. Justice Clark extended the time until April 12, 1964, a Sunday. The petition in Number 1288 Misc. was filed on April 13, 1964.

QUESTIONS PRESENTED

1. Whether the proof showed separate conspiracies (Nos. 974 and 975).

2. Whether in a trial for conspiracy to violate 21 U.S.C. 174, it was proper to instruct that knowledge of illegal importation might be presumed from evidence of actual or constructive possession (Nos. 974, 975).

3. Whether the trial judge properly refused to instruct that narcotics addiction was a matter bearing upon credibility of a witness, where he gave full general instructions on the issue of credibility (all petitions).

4. Whether it was error for the judge to charge, *inter alia*, that an attorney has no special status allowing him to commit a crime (No. 973).

5. Whether petitioner Gayles' attempts to frustrate the apprehension and prosecution of a co-conspirator occurred after attainment of the central purposes of the conspiracy (No. 973).

6. Whether various trial rulings were correct (No. 974).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, the five petitioners and one other were convicted on a one-count indictment charging a conspiracy to violate 21 U.S.C. 174 involving the concealment, purchase, and sale of illegally imported heroin. Petitioners Spurlark, Faulkner and Davis were sentenced to 10 years' imprisonment, and petitioners Green and Gayles to 5 years' imprisonment. The court of appeals affirmed all convictions on a consolidated appeal.

The government's evidence showed that petitioner Spurlark sold narcotics to various people in Chicago, Illinois, from 1951 to 1958 (A. 54–62, 178–183, 197–198, 200–202, 301–305).[1] Early in 1955, at a meeting attended by Spurlark, Green, and government witness Evans (who was a narcotics dealer), among others, it was decided that "Dennis Green was going to take over the sale of narcotics on the west side, and everybody who was buying stuff from over there would have to buy from Dennis Green" (A. 232). Shortly after that meeting, during which petitioners Green and Spurlark discussed the payment of fees for police protection, Green told Evans that he would have to pay $300 per month for protection (A. 244). In November or December of 1955, Evans and petitioner Faulkner, a competing west side narcotics dealer,

[1] "A." refers to the joint appendix in the court of appeals which is on file with the Clerk of this Court.

decided to merge. Faulkner called Green, and, after a discussion with Green during which the details were worked out, Evans and Faulkner combined. They immediately purchased from Green some $6,000 worth of narcotics which they eventually distributed for resale (A. 233).

In February 1956 petitioner Gayles, who was Spurlark's attorney, told Faulkner and Evans that the police were looking for them and that "it was real hot" (A. 234, 248, 249). As a result, Evans left town for about six weeks (A. 234–235). When he returned in April 1956, Evans purchased $3000 worth of heroin from Green for resale (A. 235). In June 1956, after the Evans-Faulkner arrangement had been terminated, Green told Evans of a shortage of supply in narcotics, but later reported that when petitioners Spurlark and Faulkner returned from a trip "the stuff was in" (A. 236). Green went to California for two months in 1956, and told Evans that Faulkner would be in charge of the business during Green's absence (A. 236–237).

Petitioner Gayles was an attorney and a former federal narcotics agent (A. 94, 316–317). Government witness Wilson (another narcotics dealer) testified that on Spurlark's direction he attended a meeting at Gayles' house in September or October 1954, at which Gayles was present and which had been called for the purpose of discussing the elimination of a narcotics competitor named "Big John" who had been taking business away from Spurlark (A. 91–93). In November 1954, Wilson—who had been told by Spur-

lark to call Gayles when in trouble (A. 94)—was represented by Gayles after having been arrested by the Chicago police, apparently for a narcotics violation (A. 93, 96, 112–113). After the case against Wilson was dismissed, Gayles told Wilson that he should use gloves when handling packages, and that he should be careful of the telephone and of tape recorders because "they are on to you now, and they will be trying to get you" (A. 96). In 1957 Gayles also assisted Evans in "fixing" a local charge after he consulted with Green (A. 245, 250).

Petitioner Davis sold narcotics in 1958 at the direction of Spurlark (A. 183) and was present during sales at an apartment to which Spurlark sent customers (A. 61–62, 303–304). On two occasions in 1958 Spurlark sent Davis to Detroit to collect money from a narcotics customer (A. 305–306).

ARGUMENT

1. There is no merit to the argument of Green and Spurlark that the evidence did not show a single conspiracy. While there is evidence that Spurlark and Green had once been competitors (A. 230), the record is replete with testimony showing that Green joined forces with Spurlark in 1955 and worked in concert with him thereafter. Faulkner and Evans were associated with Green on the west side and Davis worked directly for Spurlark. While distribution in different areas was handled by different people, the entire operation was part of one plan, with Gayles as adviser to the ring. The suggestion by Green that his activities were not tied to Gayles is refuted by testimony of the arrangement between

Spurlark and Green as well as by evidence that Gayles contacted Green about "fixing" a charge against government witness Evans, who was one of Green's customers (A. 250).

2. Petitioners Green and Spurlark contend that they had no knowledge of illegal importation and that it was error for the judge to instruct on the statutory presumption flowing from possession (Pet. No. 975, pp. 31–34; Pet. No. 974, pp. 14–15). It is, however, well settled that the presumption as to knowledge of illegal importation embodied in 21 U.S.C. 174 may be brought into play upon proof of actual or constructive possession of the narcotic, and there was in this case abundant proof of both actual and constructive possession by both petitioners. The present argument, which was not made at trial, is based upon an apparent misconception of the holding of *United States* v. *Massiah*, 307 F. 2d 62 (C.A. 2), certiorari granted on other issues, 374 U.S. 805. That decision does not stand for the proposition that it is reversible error to apply the presumption in a conspiracy case; on the contrary, it was the very absence of any instruction on importation—including the applicability of the presumption—with regard to the conspiracy which caused reversal in that case. Here, there were full instructions on the element of importation and on the presumption (A. 424, 426–427).

Nor is there substance to the suggestion that the statutory presumption does not apply to conspiracy cases. The statute itself refutes this argument since conspiracy is made an offense under 21 U.S.C. 174, and the courts have consistently treated the presump-

tion as applicable to conspiracies. See, *e.g.*, *United States* v. *Burrell*, 324 F. 2d 115 (C.A. 7), certiorari denied, 376 U.S. 937; *United States* v. *Paniça*, 290 F. 2d 97 (C.A. 2), certiorari denied, 363 U.S. 880; *Marcella* v. *United States*, 285 F. 2d 322 (C.A. 9), certiori denied, 366 U.S. 911.

3. Some government witnesses, including Evans and Wilson, had been narcotic addicts at the time of the events in question. All petitioners maintain that the trial judge should have given a particularized instruction as to the assumed effect of narcotics addiction on credibility.[2] There is, however, no evidence in the record concerning the effect of addiction on credibility, and there is no medical consensus on the issue. See *Kelly* v. *Maryland Casualty Co.*, 45 F. 2d 782 (W.D. Va.), affirmed, 45 F. 2d 788 (C.A. 4), where the court extensively analyzed legal and medical authorities; see also *Weaver* v. *United States*, 111 F. 2d 603 (C.A. 8).[3] Consequently, there was no reason for

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[2] The requests are found at A. 442–443. The requests were made by petitioners Faulkner and Gayles and concurred in by petitioner Spurlark (A. 439). We treat the question as applicable to all petitioners.

[3] *Fletcher* v. *United States*, 158 F. 2d 321 (C.A. D.C.), relied upon by petitioners, dealt with an entirely different situation. The witness in that case was a *paid* informer who was also an addict, and the court held that on the facts it was error not to instruct "that the informer's testimony should be examined by the jury with greater scrutiny and care than the testimony of an ordinary witness." In the instant case there was no evidence that any addict witness was acting for the government when the events occurred. Moreover, the court here did instruct that the jury might consider anticipated rewards or promises of immunity as bearing upon the credibility of witnesses (A. 420–421).

the district court to give undue emphasis to this one debatable element of credibility by singling it out in an instruction.[4] As Professor McCormick concludes (*Handbook of the Law of Evidence* (1954), pp. 98–99):

> It can hardly be contended that there is such scientific agreement as to warrant judicial notice that addiction of itself usually affects credibility.

4. Complying with Gayles's request, the judge told the jury that a lawyer's representation of conspirators in prior narcotics cases did not alone supply evidence of guilt; that a lawyer is bound to present all defenses; and that a lawyer need not reveal to authorities any information disclosed to him by clients (A. 431–432). To this instruction the judge added the following paragraph (A. 432):

> You are not to infer from the foregoing however, that an attorney has any special status which permits him to perform an unlawful act, or to join an unlawful conspiracy, nor may he knowingly assist a client to commit an unlawful act or to further an unlawful conspiracy.

The qualifying paragraph is a correct statement properly added by the court to the proposed instruction

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[4] Petitioner Green also attacks that portion of the instructions relating to a presumption that a witness tells the truth, relying on language in *Knapp* v. *United States*, 3[illegible] F. 2d 794 (C.A. 5). The short answer to the contention is that the point was not raised at trial and therefore is not cognizable on appeal, which is precisely what *Knapp* held. Moreover, whatever may be said for the instruction, the instant case—unlike *Knapp*—was not one where the only witnesses were those for the government. Indeed, petitioner Green himself was a witness; thus it could not possibly be argued here that the "presumption" instruction was tantamount to a directed verdict of guilty.

so as not to leave an erroneous impression in the jury's mind that an attorney was beyond the ambit of the criminal law. A judge may properly qualify a requested instruction to make it accurate. See *Johnson alias Overton* v. *United States*, 157 U.S. 320, 325.

5. Gayles' efforts to warn Evans, a Green-Spurlark customer, to leave town when police were looking for him in February 1956 and to fix his case in August 1957 occurred while the central purposes of the conspiracy were being executed. The record shows that after Evans returned from hiding in April 1956 he continued to purchase narcotics from Green and Faulkner until 1959 (A. 234–239). Gayles' activities were consequently in furtherance of the conspiracy insofar as they protected Evans—one of the conspiracy's dealers—from arrest and confinement. *Grunewald* v. *United States*, 353 U.S. 391, and like cases dealing with concealment activities occurring after the central object of the conspiracy had been accomplished are clearly distinguishable on this ground.

6. a. There is no merit to the contention of petitioner Spurlark that the testimony of Mrs. Wilson should have been stricken because of the destruction of notes which were used to prepare an interview report. Since the report itself was made available (A. 146), petitioner can have no complaint. *Campbell* v. *United States*, 373 U.S. 487; *Killian* v. *United States*, 368 U.S. 231, 242.

b. Spurlark also argues that he was prejudiced by the destruction of certain exhibits (Pet. No. 974, p. 15) which, although not clearly described (A. 159–160), apparently were actual narcotics obtained by an agent from Willard Jones, a co-defendant. The

"destruction" is not shown by the record, but in any event it is settled that neither the best evidence rule nor any other rule requires production of the actual narcotics about which a witness testifies. See *Francis* v. *United States*, 239 F. 2d 560 (C.A. 10); *Lebron* v. *United States*, 241 F. 2d 885 (C.A. 1), certiorari denied, 354 U.S. 911.

c. Finally, the trial judge did not commit error in allowing the interruption of the witness Evans and the calling of agent Valentine in order to settle a question which had arisen in the course of Evans' testimony—whether or not Valentine had been present in the grand jury room when Evans testified. The court felt that Evans' testimony on the matter was "not so clear" and that testimony from Valentine would be desirable. (A. 263). It was well within the area of the court's discretion to resolve this question which might have revealed the presence of an unauthorized person in the grand jury room and required dismissal of the indictment—as quickly as possible.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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